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No.

IN THE

Supreme Court of the United States

October Term, 1982

EVERETT JONES, Superintendent, Great Meadow Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

against

PEDRO ARROYO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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Question Presented

At respondent Arroyo's state trial, defense counsel approved a proposed supplemental instruction on intent which stated that people are presumed to intend the natural, probable and logical consequence of their acts. In light of Arroyo's express consent to that language, can he successfully maintain in a federal habeas corpus proceeding that inclusion of that language in the charge denied him due process?

The Court of Appeals answered that question in the affirmative.

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PETITION FOR A WRIT OF CERTIORARI

To: The Honorable Chief Justice and the Associate Justices of the Supreme Court:

The District Attorney of New York County, on behalf of Everett Jones, the Superintendent of the Great Meadow Correctional Facility, and Robert Abrams, the Attorney General of the State of New York, petitions for a writ of certiorari to review a judgment of the United States Court

of Appeals for the Second Circuit. By that judgment, the Court of Appeals affirmed a decision of the United States District Court for the Southern District of New York granting respondent Arroyo a writ of habeas corpus.

Opinions Below

The opinion of the Court of Appeals, which is not yet reported, is set forth in Appendix A, *infra*. The opinion of the United States District Court for the Southern District of New York, which is reported at 534 F.Supp. 980 under the name *Rivera* v. *Coombe*, is set forth in Appendix B, *infra*.

Jurisdiction

The judgment of the Court of Appeals was entered on July 23, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Constitutional and Statutory Provisions Involved

The Fourteenth Amendment of the United States Constitution provides, in pertinent part:

> [N]or shall any State deprive any person of life, liberty or property, without due process of law. . . .

Statement of the Case

The State Trial Court Proceedings

Respondent Pedro Arroyo was indicted on June 9, 1972, in New York Supreme Court, New York County, for the attempted murder of a police officer named Raymond Bernard and for four related offenses. N.Y. Co. Ind. No. 2447/72. He proceeded to trial before Justice Hilda Schwartz and a jury on February 28, 1973.

The People's Case

At approximately 6:20 p.m. on April 13, 1972, a central police dispatcher issued a radio communication reporting a burglary in progress at a music store at 2152 Third Avenue in Manhattan. Upon hearing the report, uniformed Police Officers **Robert Glickstein** and **Douglas Schmidt** drove to the store in their marked police car (Glickstein: 283-87, 310-11; Schmidt: 329-31).* Officer Glickstein entered the music store as three men exited, brushing against him. The proprietor of the store screamed, "Get them," referring to the three men, who were walking in different directions. One of them was respondent Pedro Arroyo (Glickstein: 28, 290; Schmidt: 331).

Officers Glickstein and Schmidt stopped Arroyo about twenty feet from the music store, and walked him back to the store (Glickstein: 289-90; Schmidt: 332). As they reached the store, four other police officers drove up. At that point Arroyo jabbed Officer Glickstein with his elbow,

* Parenthetical references in this petition are to the minutes of respondent Arroyo's trial, unless otherwise identified.

broke free, and fled south (Dunn: 354-56; Johnson: 374-76; King: 389-91; Bernard: 422-25; Glickstein: 290; Schmidt: 332).

Uniformed Police Officer **Raymond Bernard**, who had just emerged from his police car, chased Arroyo and tried to tackle him on the corner of 117th Street and Third Avenue. Arroyo "squeezed past" Officer Bernard and, as he did so, reached beneath his jacket to the left chest area. He then drew out a gun and aimed back at Officer Bernard. The officer drew his service revolver and extended his right arm in a firing position (Glickstein: 296-99; Dunn: 357; King: 391; Bernard: 425-27, 456).

Arroyo fired first, from a position approximately five feet from Officer Bernard. Officer Bernard clutched his chest, which felt as if it had been "hit with a rock," and returned fire. Arroyo leaped over a car hood, then turned and discharged a second shot "directly" at Officer Bernard. The second shot missed (Glickstein: 299-301; Bernard: 427-29).

As other officers joined in the gun battle, Arroyo shielded himself behind a vehicle. He fired another round at Officer Bernard, and shot at the other officers as well. Finally, he shouted, "I'm hit. I give up." The police approached and one officer asked, "Where is the gun?" Arroyo answered, "Under the car," and the officer recovered the gun, a .32 caliber revolver from which all five shells had been discharged (Schmidt: 335-37; Dunn: 359-60; Johnson: 379-80; King: 393-94; Glickstein: 301-05; Bernard: 430-31; Cunningham: 506-07). When Arroyo was taken to a hospital, a shoulder holster was removed from

underneath his left arm before he was treated for his bullet wounds (Byrne: 403-07; Korsnes: 414-17).

After Arroyo surrendered, Officer Bernard examined himself and his service revolver. He discovered that Arroyo's first shot, fired while the officer was aiming his own revolver, had struck and shattered the wooden grip of that revolver. The bullet had traveled along the officer's hand, leaving a thin line of lead shavings beneath the skin, and then had hit the officer's chest, leaving a bullet hole in his police jacket (Bernard: 434, 439).

The Defense Case

Anna Colazo, a friend of Arroyo's family, and her daughter **Sue Lydia Pratts** testified that they saw the police shoot Arroyo. Both witnesses denied that Arroyo had a gun or fired any shots at the police (Colazo: 520-26, 537-38; Pratts: 546-49, 591-606). On cross-examination, Mrs. Colazo admitted that she told a defense investigator a week before the trial that Arroyo had been running with two males, one of whom was carrying a conga drum. The man with the drum had yelled to Arroyo, "Don't give up my gun." In her signed statement to the investigator, she had also stated that Arroyo had drawn a gun and fired three times. The statement was admitted in evidence (Defense Exhibit 1; Colazo: 528-29, 533-35, 540-41).

Pedro Arroyo testified that as he was walking alone on Third Avenue between 117th and 118th Streets, a uniformed police officer approached with his weapon drawn. Before the officer said anything, Arroyo pushed aside and held the officer's gun hand, grabbed a second gun from the officer's belt, hit the officer with the second gun, and then fled. As

Arroyo ran, other uniformed police officers shot at him. Arroyo was hit. When he "woke up" he found himself on the ground, and tried to surrender. However, the officers continued to fire and then kicked him. Arroyo testified both that he did not remember shooting at the police, and that he had not done so. He also denied that he robbed the music store and that he wore a holster that day (Arroyo: 608-13, 615-16, 618-19, 626-33, 636-37).

The Verdict and Sentence

During their deliberations the jurors reached guilty verdicts on the four lesser charges, and in doing so necessarily made findings that Arroyo acted with a specific intent when he fired at Officer Bernard. The jurors then asked for further instructions on intent before determining the attempted murder count. After Arroyo gave express consent, the court included in its supplemental charge the sentence,

> By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts.

The jurors thereafter found Arroyo guilty of attempted murder as well. On April 12, 1973, Arroyo was sentenced on the attempted murder count to an indeterminate prison term of from fifteen years to life, and on the remaining charges to shorter concurrent prison terms.

The State Post-Conviction Proceedings

Arroyo did not perfect his appeal to the Appellate Division, First Department, of the New York Supreme Court until the January Term of 1977. Among his several appel-

late arguments was a claim that the trial judge had erred in including presumption language in her supplemental instruction on intent. On April 14, 1977, the Appellate Division unanimously affirmed Arroyo's conviction for attempted murder in an opinion that did not address Arroyo's claim about the intent instruction. *People* v. *Arroyo,* 57 A.D.2d 523, 393 N.Y.S.2d 570 (1977). Leave to appeal to the New York Court of Appeals was denied by Chief Judge Charles D. Breitel on May 12, 1977. *People* v. *Arroyo,* 42 N.Y.2d 826, 364 N.E.2d 1346, 396 N.Y.S.2d 1029 (1977).

On October 23, 1979, Arroyo moved in the trial court for an order vacating the judgment of conviction. Citing *Sandstrom* v. *Montana,* 442 U.S. 510 (1979), Arroyo argued that the presumption language in the supplemental intent instruction had denied him due process. Justice Schwartz denied the motion. Justice Schwartz rejected the prosecutor's argument that Arroyo's failure to object to the intent instruction at trial constituted a forfeiture of the claim, and reached the merits.* On the merits, however, Justice Schwartz found that the use of presumption language had not denied Arroyo due process because

> in the totality of the entire charge and the detailed instructions to the jury in this case [the presumption language] did not have the same potential for impermissible burden shifting as the instruction struck down by the Supreme Court in *Sandstrom* (Opin. of May 19, 1980 at 14).

* Justice Schwartz's decision to reach the merits of the claim was the product of an incorrect understanding of New York procedural law. As the New York Court of Appeals made plain later in 1980, Arroyo's failure to object to the instruction should have been treated as a waiver of his claim. *People* v. *Thomas,* 50 N.Y.2d 467, 407 N.E.2d 430, 429 N.Y.S.2d 584.

Arroyo's application for leave to appeal Justice Schwartz's order to the Appellate Division, First Department, was denied on September 18, 1980. No further appellate review was available.

The District Court Proceedings

Arroyo filed a petition for a writ of habeas corpus in the United States District Court for the Southern District of New York in February, 1981. On February 11, 1982, the district court (Ward, D.J.) granted the petition, ruling that the presumption language in the supplemental intent instruction denied Arroyo due process. In his opinion Judge Ward disagreed with Justice Schwartz's conclusion that the charge as a whole properly informed the jury that the prosecution had the burden of proving Arroyo's criminal intent.

The Proceedings in the Circuit Court of Appeals

On July 23, 1982, the Court of Appeals (Oakes, Meskill, and Kearse, C.J.) affirmed the judgment of the district court. In its discussion the court concluded that because the challenged presumption language was included in a supplemental intent instruction, delivered after the jury asked for a further explanation about intent, the court could not conclude that the "offending language" was "harmless beyond a reasonable doubt" (App. A at 9a). In its legal discussion the court made no reference whatever to the fact that Arroyo had consented at trial to the instruction which supposedly denied him due process.

Reasons for Granting the Writ

The decision below, which granted habeas corpus relief to a state prisoner convicted over nine years ago for attempting to kill a police officer, turned on the resolution of a conflict created by two of this Court's decisions. On one hand, this Court has held that a jury instruction on intent stating that the law presumes that a person intends the natural and probable consequences of his acts can amount to a denial of due process. *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). In *Sandstrom*, however, the defendant's intent was the sole issue at trial, and the defendant objected vigorously to the inclusion of the presumption language in the intent instruction. On the other hand, this Court has also held that if a state prisoner makes no effort to change an instruction through an objection, and thus is denied nothing he thought important enough to request, only under rare circumstances can it be determined on collateral attack that the instruction denied him due process. *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

In this case, Arroyo, at his 1973 trial, failed to object to the inclusion of presumption language in the court's supplemental intent instruction. Indeed, Arroyo was consulted about the instruction in advance, and expressly consented to the proposed language. Arroyo's consent to the "natural and probable consequences" instruction may well have been the product of strategy, for the shots he fired fortuitously did not cause serious injury, and he may have thought it to his advantage to obtain an intent charge which focused attention on the consequences of his acts. Had the holding in *Henderson* v. *Kibbe* been applied, Arroyo's con-

sent to the charge should have been fatal to the due process attack on that charge, presented years later in Arroyo's habeas corpus petition.

The court below, however, resolved Arroyo's claim in Arroyo's favor, without any discussion whatever of Arroyo's consent to the charge. Apparently the court believed, as Arroyo in essence argued, that *Henderson* v. *Kibbe* lost its vitality when this Court decided *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). After *Wainwright* v. *Sykes*, the argument went, a failure to object should be considered only in the context of a procedural default claim, and should thereafter be ignored completely if the merits of the due process claim are reached.

Whether the court below was correct in believing that failure to object, or even express consent, to a jury instruction has no bearing whatever on the resolution of the merits of a subsequent due process attack on the instruction is a narrow, significant issue of habeas corpus law which should be resolved by this Court. The decision of the court below to ignore Arroyo's consent in its due process analysis is in apparent conflict with a recent decision of the Court of Appeals for the Sixth Circuit, in which that court considered highly relevant to the merits of a due process claim that at trial the petitioners had never protested the instructions later attacked in a habeas corpus proceeding. *Turoso* v. *Cleveland Municipal Court*, 674 F.2d 486, 494-95 (6th Cir. 1982) (petition for certiorari pending). Indeed, the decision below is inconsistent with the due process analysis employed by a district judge in the Second Circuit, in a case in which he sat by designation on the Circuit Court of

Appeals. *Ramirez* v. *Jones*, 683 F.2d 712, 717-18 (2d Cir. 1982) (Leval, D.J., concurring). Surely, the lower courts that will determine future habeas corpus petitions are entitled to guidance on whether, as the court below concluded, this Court's recent decision in *Henderson* v. *Kibbe* has effectively been overruled.

If the question here presented were one affecting only federal interests, it might be appropriate for this Court to withhold guidance from the lower courts pending further consideration of the matter in those courts. But habeas corpus law of course affects vital concerns of the states, and those concerns should not be left at risk when a decision from this Court reaffirming or limiting a prior decision could readily resolve the question. Moreover, the decision below could place those concerns at risk frequently, given this Court's recent statement that the merits of due process claims must be resolved in cases, like this one, in which a state court has considered the merits despite the defendant's failure to make proper objections. *Engle* v. *Isaac*, —— U.S. ——, 102 S. Ct. 1558, 1575 n. 44 (1982).

In this case, for example, New York has a most legitimate interest in the survival of an attempted murder conviction almost a decade old, arising from respondent Arroyo's effort from point-blank range to kill a New York City police officer who was simply performing his duties. Nonetheless, the court below concluded that Arroyo must be retried, solely because of an instruction Arroyo expressly approved in advance, and reached that conclusion without even considering his consent. The decision of the court below not to consider consent in evaluating a due process claim in a habeas corpus proceeding presents a substantial issue calling for review by this Court.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September, 1982

APPENDIX A

Opinion of the Circuit Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1267—August Term, 1981

(Argued June 17, 1982 Decided July 23, 1982)

Docket No. 82-2072

PEDRO ARROYO,

Petitioner-Appellee,

—v.—

EVERETT JONES, Superintendent, Great Meadow Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents-Appellants.

Before:

OAKES, MESKILL, and KEARSE,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge,* granting state prisoner's petition for a writ of habeas corpus on ground of constitutionally infirm supplemental instruction.

Affirmed as modified.

JOHN D.B. LEWIS, New York, New York (William E. Hellerstein, The Legal Aid Society, New York, New York, on the brief), *for Petitioner-Appellee.*

Appendix A

MARK DWYER, New York, New York (Robert M. Morgenthau, District Attorney for New York County, Amjane Rettew, New York, New York, on the brief), *for Respondents-Appellants.*

KEARSE, *Circuit Judge*:

The State of New York appeals from an order of the United States District Court for the Southern District of New York, Robert J. Ward, *Judge,* granting the petition of state prisoner Pedro Arroyo for a writ of habeas corpus on the ground that the state trial judge's supplemental jury charge, that "people are presumed to intend the natural, probable and logical consequence of their acts," unconstitutionally deprived Arroyo of the presumption of innocence, in violation of *Sandstrom v. Montana,* 442 U.S. 510 (1979). We modify and affirm the order of the district court.

FACTS

Arroyo was convicted in 1973, after a jury trial in New York State Supreme Court, of one count of attempted murder, three counts of assault, and one count of possessing a weapon. Two versions of the events leading to the charges against Arroyo emerged at the trial. According to the prosecution's witnesses, on April 13, 1972, Arroyo was apprehended by two New York City police officers shortly after leaving the scene of a robbery. He was being returned to the scene of the robbery when he broke free from the officers and ran. He was quickly pursued by a third officer, Raymond Bernard, who attempted to tackle him.

Arroyo dodged the tackle, drew a revolver, and fired at Bernard. Bernard had drawn his own handgun and extended his right arm into a firing position. Arroyo's shot, from five feet away, struck and shattered the grip of Bernard's gun, and the spent bullet pierced Bernard's police jacket but not his chest. Bernard returned fire; Arroyo leaped over a car hood and fired at Bernard twice more, missing both times. The police officers eventually wounded Arroyo, who thereupon surrendered.

Arroyo testified that his memory of the events was sketchy because of the injuries he had sustained. He recalled having been accosted by a gun-wielding stranger who had a second gun in his waistband. He stated that he had immediately pushed aside and held the man's gun hand, grabbed the other gun from the man's belt, struck him with that gun, and fled. As he ran, he was shot and wounded. Arroyo testified that he had no recollection of ever firing a gun. Two other defense witnesses also testified that Arroyo had not fired a gun and that all of the shooting had been done by the police officers.

When the trial judge instructed the jury, before discussing any of the charges specifically, she instructed the jury that the prosecution bore the burden of proving every element of every alleged crime beyond a reasonable doubt. As to the attempted murder count, the judge stated that the "intent to cause the death of Raymond Bernard" was an essential element of the crime, and defined intent without using any language that could have been interpreted as

shifting the burden of proof.[1] The same unobjectionable instruction as to intent was given twice more with respect to other counts. These initial instructions are unchallenged.

Several times during the course of its deliberations, the jury made inquiries of the trial judge. First, it asked to have the testimony of Officer Bernard reread. The second request, made approximately four hours after the deliberations had begun, was for "the law and the interpretation of the [attempted murder] charge." The trial judge repeated, in large part, her initial instructions concerning that count, including the proper instructions on intent. After deliberating for another two hours, the jury returned to ask, "[d]oes shooting at a policeman necessarily constitute attempt[ed] murder?" The trial judge responded as follows:

---

1. The trial judge's instruction on intent was as follows:

> What is intent; under our law, a person acts intentionally with respect to attempting to cause the death of another person when the alleged perpetrator's conscious objective is to cause such death. This portion of my charge is concerned itself only with the attempt to commit the crime of murder based on the intention to cause the death of a victim, of course, we all recognize that an intention is a subjective matter and it depends on the operation of an individual's mind none the less it is possible to make a finding of intention based on objective actions of the alleged perpetrator; in fact, this is the only method that we can use in determining intention since we cannot get into the mind of the alleged perpetrator. Therefore, in your deliberation, you may use the defendant's objective action as a determining factor in deciding whether or not he acted intentionally.
>
> You may also refer to all the other evidence which may indicate intent or not indicate intent. The Penal Law of the State of New York defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

Appendix A

> [T]he law which defines murder and attempt mentions only persons as to the elements of that crime, it applies to all persons.
>
> Attempted murder is defined in the law, a person is guilty of attempted murder[,] and I am combining the statute on attempt as well as murder[,] when with intent to cause the death of another person he attempts to cause the death of such person.

(Tr. 808.) The jury returned to the jury room, but returned twelve minutes later, some six and one-half hours after it had begun deliberations, with another inquiry, as follows:

> We have reached agreements on four charges and divided on the fifth one, to assist us with the latter, we would seek further classification [*sic*] of the words conscious intent.

(Tr. 810.) The parties are in accord that the charge on which the jury had not reached agreement was that of attempted murder.

The trial judge conferred with the prosecutor and defense counsel before responding. The prosecutor suggested that the jury be instructed that "people are presumed to intend the natural, probable and logical consequence of their acts." Arroyo's lawyer stated that he had no objection. The trial court then gave the following supplemental instruction:

> Now, Members of the Jury, a person acts intentionally with respect to attempting to cause death or injury to another person, when the alleged perpetrator's conscious objective is to cause such death or injury.

> Intention is a subjective thing and depends on the operation of the individual's mind, nonetheless, it is possible to make a finding of intention based on the objective actions of the individu[al].
>
> The Penal Law defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute to finding [*sic*] an offense when his conscious objective is to cause such result or to engage in such conduct.
>
> *By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts.*

(*Id.*; emphasis added.) Twenty-five minutes later the jury returned a verdict of guilty on all counts.

Arroyo perfected his appeal to the Appellate Division in 1977. He argued that, although the portion of the supplemental charge italicized above represented a correct statement of New York law,[2] the presumption language denied him due process of law by nullifying the prosecution's duty to prove intent and shifting to him the burden of proof on that issue on the attempted murder count. The Appellate Division unanimously affirmed Arroyo's conviction for attempted murder; it dismissed the remaining four counts because they had merged with the attempted murder count. Leave to appeal to the New York Court of Appeals was denied.

---

2. *Sandstrom v. Montana, supra,* was not decided for two years, and although following *Sandstrom* the New York Court of Appeals stated that the law of New York had long held the *Sandstrom*-type charge to be erroneous as a matter of state law, *People v. Thomas,* 50 N.Y.2d 467, 472 (1980), there were a number of New York cases upholding similar presumption language, *see id.* at 474 and cases cited therein (Fuchsberg, J., concurring).

Appendix A

In October 1979, a few months after the United States Supreme Court's decision in *Sandstrom v. Montana*, 442 U.S. 510, Arroyo pursued his due process claim in New York State Supreme Court by moving pursuant to New York Criminal Procedure Law § 440.10 to vacate the judgment of conviction. The State opposed the motion on the ground that Arroyo's failure to object at trial to the presumption instruction constituted a forfeiture of the claim. The court rejected this argument, but denied the motion on its merits, on the ground that

> in the totality of the entire charge and the detailed instructions to the jury in this case [the presumption language] did not have the same potential for impermissible burden shifting as the instruction struck down by the Supreme Court in [*Sandstrom v. Montana, supra*].

(Opin. of May 19, 1980 at 14). Leave to appeal to the Appellate Division was denied, thus exhausting Arroyo's state court remedies.

Arroyo then commenced the present proceeding in the district court, seeking a writ of habeas corpus.[3] In an opinion dated February 11, 1982, the district court ruled that, under *Sandstrom v. Montana, supra*, the inclusion of the presumption language in the supplemental instruction on intent denied Arroyo due process. The court granted

3. In light of the state court's rejection of the State's procedural argument and its decision on the merits of Arroyo's due process claim, Arroyo's failure to object at trial to the presumption language does not bar federal review. *Engle v. Isaac*, 102 S. Ct. 1558, 1575 n.44 (1982); *Washington v. Harris*, 650 F.2d 447, 452 (2d Cir. 1981).

the writ, ordering that the State either release Arroyo from custody or retry him within sixty days. This appeal followed.[4]

DISCUSSION

In *Sandstrom v. Montana*, which has been the subject of considerable recent discussion in this Court, *see, e.g., Ramirez v. Jones*, No. 81-2431 (2d Cir. June 30, 1982); *Rivera v. Coombe*, No. 82-2086 (2d Cir. June 29, 1982); *Mancuso v. Harris*, No. 81-2283 (2d Cir. Apr. 13, 1982); *Nelson v. Scully*, 672 F.2d 266 (2d Cir.), 50 U.S.L.W. 3948 (June 1, 1982); *Washington v. Harris*, 650 F.2d 447 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1455 (1982), the United States Supreme Court ruled that a jury instruction that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," violates the defendant's right to due process because it tends to shift the burden of proof on the issue of intent to the defendant and to deprive the defendant of the presumption of innocence. In the present case the State does not seriously contend that the portion of the supplemental instruction challenged by Arroyo—"people are presumed to intend the natural, probable and logical consequences of their acts"—is not the same type of instruction found invalid in *Sandstrom*.[5]

4. Following the district court's decision, the parties agreed to a stay of the order pending a decision of this appeal, and Arroyo remains incarcerated.

5. In its Brief on Appeal at 13, the State says, "Certainly, it would have been preferable had the trial judge not included the quoted sentence in her instructions. *See Sandstrom v. Montana*, 442 U.S. 510 (1979)."

Rather, it contends principally that, when read in light of the charge as a whole, as is required by *Cupp v. Naughten*, 414 U.S. 141 (1973), the presumption language did not have the effect of shifting the burden on intent to Arroyo and did not deprive him of the presumption of innocence. We reject the State's argument. In light of the special prominence of the presumption language by reason of its presence in a supplemental instruction, *see Bollenbach v. United States*, 326 U.S. 607 (1946), and the series of questions from the jury that preceded it, we cannot conclude that the offending language was "harmless beyond a reasonable doubt," *Chapman v. California*, 386 U.S. 18, 24 (1967).

In *Nelson v. Scully, supra*, we discussed thoroughly the need, in reviewing trial court instructions, not to view the improper language in isolation and to evaluate the charge as a whole, in order to determine whether the improper language " 'so infected the entire trial that the resulting conviction violates due process.' " 672 F.2d at 272 (quoting *Cupp v. Naughten, supra*, 414 U.S. at 147). *Nelson* and the other cases heretofore considered by this Court in the wake of *Sandstrom* have dealt with offending language in the body of the court's principal (or only) charge, rather than in a supplemental charge such as that confronting us here.

A supplemental charge must be viewed in a special light. It will enjoy special prominence in the minds of the jurors for several reasons. First, it will have been the most recent, or among the most recent, bit of instruction they will have heard, and will thus be freshest in their minds. Moreover, it will have been isolated from the other instructions they

have heard, thus bringing it into the foreground of their thoughts. Because supplemental instructions are generally brief and are given during a break in the jury's deliberations, they will be received by the jurors with heightened alertness rather than with the normal attentiveness which may well flag from time to time during a lengthy initial charge. And most importantly, the supplemental charge will normally be accorded special emphasis by the jury because it will generally have been given in response to a question from the jury. The particularly telling impact of a supplemental instruction—and especially the last such instruction—upon a jury was recognized in *Bollenbach v. United States, supra,* as follows:

> The Government suggests that the judge's misconceived "presumption" was "just what it appears to be—a quite cursory, last minute, instruction on the question of the necessity of knowledge as to the stolen character of the notes—and nothing more." But precisely because it was a "last minute instruction" the duty of special care was indicated in replying to a written request for further light on a vital issue by a jury whose foreman reported that they were "hopelessly deadlocked" after they had been out seven hours.... Particularly in a criminal trial, the judge's last word is apt to be the decisive word. If it is a specific ruling on a vital issue and misleading, the error is not cured by a prior unexceptionable and unilluminating abstract charge.

326 U.S. at 611-12.

On the record before us there is every reason to believe that the court's presumption language made a special im-

pression on the jurors. It was the last sentence they heard before returning for their final minutes of deliberation. It was a brief and pointed statement. And, most importantly, it gave them a way to decide the issue that had caused them, first, to ask for an interpretation of the original instructions on attempted murder, second, to ask if a shot at a police officer necessarily evinced an attempt to murder, and third, to ask for "further cla[r]ification of the words 'conscious intent'." In light of this repeated questioning over the first six and one-half hours of deliberations, and in light of the jury's decision on the attempt count less than one-half hour after having heard the improper charge, it seems highly likely that the supplemental charge was in the forefront in the jurors' minds.

In these circumstances, we do not believe the trial court's initial unobjectionable charge on intent can be deemed to have cured the defective language in the supplemental charge. Since the initial instructions did not mention any presumption as to intent they did not give the jury an assistance in how to apply a presumption—whether they were free to disregard it, whether it was merely something they might infer, or whether the defendant had to overcome it. More importantly, the initial instructions cannot be deemed to have disinfected the later presumption language because the jury's questions reveal that the initial charge simply was not understood. In short, it is all very well as a general matter for the State to urge us to evaluate the effect of presumption language in light of the charge as a whole. But when the jurors have so little comprehended the un-

objectionable initial charge that they have found it necessary to ask three times for clarification, it would be decidedly dense of us to assume that the unobjectionable initial charge, as to which enlightenment was requested, itself enlightened the jury as to the real meaning of the improper enlightenment.

We find no merit in the State's argument that the supplemental charge was not important because intent was not a hotly debated issue at trial. It is true that intent has been a more prominent issue in cases such as *Sandstrom,* in which the defendant admitted killing the deceased but pleaded lack of intent due to a mental disorder aggravated by alcohol consumption. Although subtler here, the issue as to intent to murder was highlighted by Arroyo's testimony that he had merely tried to protect himself by knocking Bernard aside and fleeing, and that he did not remember firing a gun. Thus the trial testimony raised a question as to intent, and the jury's inquiries during its deliberations reveal that it had substantial uncertainty as to whether the State had proven intent to murder beyond a reasonable doubt.

Nor do we find any of the State's other arguments more persuasive. For example, in contending that as a practical matter the presumption language probably had little effect, the State states that

> [b]y the time the jurors heard this supplemental charge, they had already reached verdicts of guilty on four counts, and on three of those counts they had been required to find that Arroyo acted with a specific intent. Arroyo's theory that the jurors, who had three times

> properly found intent from the evidence without resort to a presumption, could have understood the supplemental charge as a direction *to ignore the evidence* about intent in reaching a verdict on the final count, is simply incredible.

(State's Reply Brief at 5; emphasis added). This argument is wide of the mark, for what the sequence of events leads us to infer is not that the presumption language caused the jurors to "ignore the evidence about intent," but rather that it may have led them to *ignore their doubts* about that evidence. This argument by the State really amounts to a contention that the jury would not have resorted to the presumption because there was adequate evidence from which it could have found the requisite intent proven. The question, however, is not whether the jury *could* have convicted on the basis of the evidence without resort to the presumption, but whether we can be sure beyond a reasonable doubt that this is what it did. *Sandstrom v. Montana, supra,* 442 U.S. at 526. Obviously, in light of the jury's repeated requests for clarification and the relative speed of its decision after receiving the presumption language, "[i]t would indeed be a long jump at guessing to be confident that the jury did not rely on the erroneous 'presumption' given them as a guide." *Bollenbach v. United States, supra,* 326 U.S. at 614.

In sum, we agree with the conclusion of the district court that the presumption language of the trial court's supplemental charge was not harmless beyond a reasonable doubt and that the petition for habeas corpus should be granted.

Appendix A

Conclusion

As noted above, the New York Appellate Division, on affirming Arroyo's conviction for attempted murder, set aside the convictions on the other four charges because they were lesser-included offenses which merged with the attempted murder conviction. The district court's decision granting habeas corpus was silent as to its effect on these extinguished lesser counts. Although we affirm the decision requiring the State to release or retry Arroyo for attempted murder within sixty days, we modify the order to permit the State to seek in state court the revival of the convictions on any of the four extinguished counts. As thus modified, the order of the district court is affirmed.

APPENDIX B

Opinion of the District Court

EDWIN RIVERA,

Petitioner,

v.

PHILLIP COOMBE, JR., Superintendent, Eastern Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

PEDRO ARROYO,

Petitioner,

v.

EVERETT JONES, Superintendent, Great Meadow Correctional Facility, and ROBERT ABRAMS, Attorney General of the State of New York,

Respondents.

Nos. 80 Civ. 7447 (RJW), 81 Civ. 1280 (RJW).

United States District Court, S. D. New York.

Feb. 11, 1982.

The Legal Aid Society, New York City, for petitioners in Nos. 80 Civ. 7447(RJW) and 81 Civ. 1280(RJW); William E. Hellerstein, John D. Lewis, Judith L. Turnock, New York City, of counsel.

Robert Abrams, Atty. Gen. of the State of N.Y., New York City, for respondents in No. 80 Civ. 7447(RJW);

Daniel Kinburn, Deputy Asst. Atty. Gen., New York City, of counsel.

Robert M. Morgenthau, Dist. Atty. of New York County, New York City, for respondents in No. 81 Civ. 1280(RJW); Mark Dwyer, Victoria Lea Smith, Asst. Dist. Attys., New York City, of counsel.

OPINION

ROBERT J. WARD, District Judge.

The two above-captioned actions were each commenced by filing a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner in 80 Civ. 7447(RJW) (hereinafter referred to as "the *Rivera* action") is Edwin Rivera, presently in the custody of the Attorney General of the State of New York at Eastern Correctional Facility in Napanoch, New York. Petitioner in 81 Civ. 1280(RJW) (hereinafter referred to as "the *Arroyo* action") is Pedro Arroyo, presently in the custody of the Attorney General of the State of New York at Great Meadow Correctional Facility in Comstock, New York. Respondents in the *Rivera* action are Phillip Coombe, Jr., Superintendent of the Eastern Correctional Facility, and Robert Abrams, Attorney General of the State of New York. Respondents in the *Arroyo* action are Everett Jones, Superintendent of the Great Meadow Correctional Facility, and Robert Abrams, Attorney General of the State of New York. The Court hereinafter refers to all three respondents individually and jointly as "the State." Because the *Rivera* action and the *Arroyo* action present very similar factual and legal issues,

the Court has determined to deal with both petitions by a single opinion. For the reasons hereinafter stated, both petitions are granted.

BACKGROUND

The procedural histories of the *Rivera* action and the *Arroyo* action may be stated in fairly brief fashion. On September 12, 1975, Rivera was convicted, following a jury trial in the Supreme Court of the State of New York, Bronx County, of manslaughter in the first degree, *see* N.Y.Penal Law § 125.20, and criminal possession of a weapon, *see* N.Y.Penal Law § 265.01(2). Rivera was sentenced to a prison term on the first-degree manslaughter count of from seven to twenty-one years and was unconditionally discharged on the other count. On October 3, 1977, Rivera's manslaughter conviction was affirmed without opinion by the Supreme Court of the State of New York, Appellate Division, First Department. *People v. Rivera,* 59 A.D.2d 829, 398 N.Y.2d 351 (1st Dep't 1977). The New York Court of Appeals denied Rivera leave to appeal to that court on November 21, 1977. *People v. Rivera,* 43 N.Y. 2d 799, 402 N.Y.S.2d 1037, 373 N.E.2d 299 (1977). Subsequently, on November 28, 1979, the judge who presided at Rivera's state trial denied Rivera's motion, pursuant to N.Y.Crim.Proc. Law § 440.10, to vacate the judgment of conviction for first-degree manslaughter. On February 5, 1980, the Appellate Division denied Rivera leave to appeal the trial judge's denial of this motion. The petition for a writ of habeas corpus that is the subject of today's decision was filed in this Court on December 31, 1980.

Appendix B

Turning to the *Arroyo* action, Arroyo was convicted on April 12, 1973, after a jury trial in the Supreme Court of the State of New York, New York County, of attempted murder in the first degree, *see* former N.Y.Penal Law § 125.30, and four lesser-included counts. Arroyo was sentenced to a prison term on the attempted murder count of from fifteen years to life. He received a sentence of up to seven years in prison on each of the other four counts. These sentences were made concurrent to one another and to the sentence imposed on the attempted murder count. On April 14, 1977, the Supreme Court of the State of New York, Appellate Division, First Department, affirmed Arroyo's conviction for attempted murder, and reversed the conviction on the other four counts on the ground that the counts should have been dismissed upon Arroyo's conviction of the greater-inclusive count of attempted murder. *People v. Arroyo,* 57 A.D.2d 523, 393 N.Y.S.2d 570 (1st Dep't 1977). The New York Court of Appeals denied Arroyo leave to appeal to that court on May 12, 1977. *People v. Arroyo,* 42 N.Y.2d 826, 396 N.Y.S.2d 1029, 364 N.E.2d 1347 (1977). Subsequently, on May 19, 1980, the judge who presided at Arroyo's state trial denied Arroyo's motion, pursuant to N.Y.Crim.Proc. Law § 440.10, for an order vacating the judgment of conviction for attempted murder. On September 18, 1980, the Appellate Division denied Arroyo leave to appeal the state trial judge's denial of this motion. The petition for a writ of habeas corpus that is the subject of today's decision was filed in this Court on March 15, 1981.

The petitions filed in the *Rivera* action and the *Arroyo* action each challenge the constitutionality of the state trial

judge's jury charge on the subject of intent. Specifically, Rivera objects to the judge's instruction that "[a] person is presumed to intend the natural and probable consequences of his act"; Arroyo challenges the judge's instruction that "people are presumed to intend the natural, probable and logical consequence of their acts." The two petitioners argue, on the basis of these essentially identical instructions, that the juries at their trials could well have understood New York law to permit the prosecution to use a constitutionally impermissible method to establish beyond a reasonable doubt the intent necessary to commit the crimes of which they presently stand convicted. Rivera contends that the trial judge's alleged constitutional error requires that he be given a new trial on the first-degree manslaughter count of which he was convicted; Arroyo contends that the trial judge's alleged constitutional error requires that he be given a new trial on the attempted murder count of which he was convicted.

Analysis of the respective contentions of Rivera and Arroyo requires a fairly detailed recapitulation of their state trials insofar as these trials concerned the issue of intent. The first-degree manslaughter charge against Rivera involved the stabbing death of one Guy Keyes. Keyes died of a knife wound in the back that he apparently received during an altercation on 174th Street in the Bronx. At his trial, Rivera admitted that he, along with a number of other individuals, had participated in an argument with Keyes. He further admitted that he had been among a crowd of people that chased Keyes down 174th Street. However, Rivera denied that he had pursued Keyes with

the intent of stabbing him, Transcript at 624, and denied that he had stabbed Keyes, Transcript at 596-97.

The state trial judge charged the jury on second-degree murder, first-degree manslaughter, and criminal possession of a weapon. In so doing, (1) he told the jury that the prosecution had the burden of proving beyond a reasonable doubt all the elements of each crime with which Rivera was charged, Transcript at 820-21, 828, 830-31, (2) he instructed the jury that an essential element of the crime of second-degree murder is "that the defendant formed the *intent* to kill the deceased herein," Transcript 821 (emphasis supplied), and (3) he further instructed the jury that an essential element of first-degree manslaughter is "that the defendant had an *intent* to cause Guy Keyes, Junior, serious physical injury," Transcript at 828 (emphasis supplied). In defining the word "intent," as he used it in the latter two instructions, the state trial judge made the following statement:

> I shall now define intent for you. *A person is presumed to intend the natural and probable consequences of his act.* Criminal intent is an intent to do knowingly and wilfully that which is condemned as wrong by the law. A criminal intent may be inferred from all the circumstances of the case. It need not be established by direct proof. To constitute the crime there must not only be the act but also the criminal intent and these must occur, the latter being equally essential with the former. The existence of criminal intent constitutes a question of fact for determination by you and the burden of showing intent, the intent with which a crime has been committed rests upon the prosecution to establish it by evidence beyond a reasonable doubt.

Appendix B

So where the law requires that the People must establish a specific or certain intent on the part of one charged with the commission of a crime, the law does not expect or require for obvious reasons that intent must be proved by directed [sic] proof to an absolute certainty or with mathematical precision. Intent, I mean criminal intent, is always an essential element to the commission of the crime such as we have here and it may be proved by direct evidence or it may be proved from circumstances surrounding the transaction or the act itself, or it may be proved by a combination of both. What is intent? Intent is a frame of mind of the perpetrator of the act at the time he commits it. You must probe the mind. You may say to yourself how are we to determine what a man's intentions are. Well members of the jury, we can only determine that by his acts, by his conduct, by what he says and by what he does. You should consider what he allegedly did, what means he allegedly employed, the type of instrument allegedly used, if any, the part of the body allegedly attacked, and all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time.

Under our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result. The intent formed, is a secret and silent operation of the mind and its physical manifestations, the accomplishment of the thing determined upon. The individual whose intent is sought to be ascertained may remain silent of [sic] if he speaks, may probably will if he has a crime to hide, speak untruthfully, and thus the mind is compelled from necessity to refer to the act and the

> physical manifestations of the intent exhibited by the results produced as the safest if not the only proof of the fact to be ascertained. A person acts intentionally with respect to or result to conduct [sic] described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

Transcript at 821-24 (emphasis supplied).

Turning to the *Arroyo* action, the attempted murder charge against Arroyo concerned a gunshot wound received by one Raymond Bernard, a member of the New York City Police Department. Bernard was wounded while attempting to stop a burglary that was in progress at a music store on Third Avenue in Manhattan. At his trial, Arroyo admitted that he had been in the vicinity of the music store on the day in question and that he had taken a gun from one of the police officers who accosted him on that day. However, he testified that he had no recollection of ever firing that gun. Transcript at 630. Sue Lydia Pratts, a witness to the shooting, testified that Arroyo never had a gun at all and that all of the shooting was done by police officers. Transcript at 597-98.

The state trial judge charged the jury on attempted murder and four lesser-included counts. In so doing, she told the jury that the prosecution had the burden of proving beyond a reasonable doubt all the elements of any crime with which Arroyo was charged, Transcript at 762, and she instructed the jury that an essential element of the crime of attempted murder is that "the defendant . . . [acted] with *intent* to cause the death of Raymond Bernard," Transcript at 759 (emphasis supplied). In defining the word

intent, as she used it in this instruction, the state trial judge made the following statements:

> What is intent; under our law a person acts intentionally with respect to attempting to cause the death of another person when the alleged perpetrator's conscious objective is to cause such death.... [O]f course, we all recognize that an intention is a subjective matter and it depends on the operation of an individual's mind none the less it is possible to make a finding of intention based on objective actions of the alleged perpetrator; in fact, this is the only method that we can use in determining intention since we cannot get into the mind of the alleged perpetrator. Therefore, in your deliberation, you may use the defendant's objective action as a determining factor in deciding whether or not he acted intentionally.
>
> You may also refer to all the other evidence which may indicate intent or not indicate intent. The Penal Law of the State of New York defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. . . .
>
> . . . .
>
> . . . What is intent, again I will define intent and intentionally to you, the Penal Law of the State of New of New York that a person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause the result or engage in a conduct [sic].
>
> . . . .
>
> . . . I have described intent and intentionally for you and defined them under our Penal Law, again, I repeat, a person acts intentionally with respect to a result or the conduct described by the law defining an

> offense when his conscious objective is to cause a result or engage in the conduct .... The law recognizes that intent is the subjective matter therefore, it allows you to base your finding of intention on any objective evidence, the defendant's action or any other evidence in the case which may indicate what his intention was.

Transcript at 760-61, 765, 767. Six and one-half hours after the jury began deliberations on the case, it sent a note to the judge stating that agreement had been reached on four of the five counts and requesting additional instructions on the meaning of the word "intent." Transcript at 808. The parties agree that the attempted murder count was the one count that remained to be resolved. In response to the request for further instructions, the judge made the following statement:

> Now, Members of the Jury, a person acts intentionally with respect to attempting to cause death or injury to another person, when the alleged perpetrator's conscious objective is to cause such death or injury.
>
> Intention is a subjective thing and depends on the operation of the individual's mind, nonetheless, it is possible to make a finding of intention based on the objective actions of the individual.
>
> The Penal Law defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute to finding [sic] an offense when his conscious objective is to cause such result or to engage in such conduct.
>
> By agreement, I can tell you that *people are presumed to intend the natural, probable and logical consequence of their acts.*

Transcript at 810 (emphasis supplied). The jury thereupon resumed deliberations. According to the minutes of

the trial kept by the court clerk, the jury's verdict of guilty on all counts was received approximately twenty-five minutes later.

DISCUSSION

As noted, each petitioner in these two actions contends that his right to a fair trial was violated by an instruction given at his trial on the subject of intent. Specifically, Rivera contends that his conviction of first-degree manslaughter was rendered constitutionally infirm by the trial judge's statement that "[a] person is presumed to intend the natural and probable consequences of his act." Arroyo argues that his conviction of attempted murder was similarly tainted by the trial judge's statement that "people are presumed to intend the natural, probable and logical consequence of their acts."

The Court begins its analysis of the merits of the petitions filed in the *Rivera* action and the *Arroyo* action by observing that the State, in opposing these petitions, does not argue that Rivera or Arroyo has either (1) failed to exhaust state remedies with respect to his constitutional claim, *see* 28 U.S.C. § 2254(b), or (2) forfeited his constitutional claim, *see Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).[1] Rather, with respect to each

1. Both Rivera and Arroyo clearly exhausted their state remedies by raising the constitutional claim in a motion pursuant to N.Y.Crim. Proc. Law § 440.10 and seeking all available appellate review of the denial of that motion. As regards *Wainwright v. Sykes*, it is well settled in this Circuit that the cause-and-prejudice test set forth in that case is only triggered if the state courts have previously invoked a procedural rule to bar the petitioner's constitutional claim. *Klein v.*

(footnote continued on next page)

petition, the State confines its opposition to arguing (1) that the instructions given by the state trial judge were not constitutionally impermissible and (2) that any constitutional error that did occur was harmless and hence cannot form a basis for this Court to grant a petition for a writ of habeas corpus. The Court deals with these two arguments in turn.

I

The basic constitutional question raised in both the *Rivera* action and the *Arroyo* action is whether a reasonable jury could have, on the basis of the trial judge's instruc-

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Harris, 667 F.2d 274, 284 (2d Cir. 1981). Since the State did not argue any procedural ground when Rivera raised his instant constitutional claim on direct appeal, *see* Respondent's Brief at 21-23, and since the judge who ruled on Rivera's motion under N.Y.Crim.Proc. Law § 440.10 did not rely on any procedural ground, but reached the merits of Rivera's claim, there can be no argument that any state court has ever refused to hear Rivera's constitutional claim for procedural reasons. Thus, *Wainwright v. Sykes* is irrelevant to the *Rivera* action. The State, in its brief opposing Arroyo's petition, does make an oblique argument that *Wainwright v. Sykes* is somehow relevant to the *Arroyo* action. The Court observes, however, that the Appellate Division, in ruling on Arroyo's constitutional claim in the context of his direct appeal, found it "without merit," 57 A.D.2d at 523, 393 N.Y.S.2d at 570, and that the judge who presided at Arroyo's trial expressly held, in ruling on Arroyo's motion under N.Y.Crim.Proc. Law § 440.10 to vacate his conviction, that the failure of Arroyo's trial counsel to object to the instruction that Arroyo now challenges did not constitute a "procedural default" under New York law. At oral argument of Arroyo's petition, the State conceded to the Court that this ruling by the state court makes *Wainwright v. Sykes* irrelevant to the Court's adjudication of Arroyo's petition, notwithstanding the fact that subsequent New York state court decisions have found similar failures to make trial objections to be procedural defaults, because there can be no argument that any state court has ever invoked a procedural rule to preclude reaching the merits of Aroyo's constitutional claim.

tions on intent, employed a constitutionally impermissible "evidentiary device" to find beyond a reasonable doubt that the petitioner acted with the intent required to commit the crime of which he stands convicted. Analysis of this question requires the Court to begin by examining the constitutional limitations on the use in the criminal context of two distinct sorts of evidentiary devices, which devices the Court herein calls "mandatory presumptions" and "permissive inferences." Then, having explained the extent to which these two types of evidentiary devices are unconstitutional if employed in the criminal context, the Court considers whether the jury at either Rivera's or Arroyo's trial could reasonably have understood the judge's charge on intent as instructing the jury to employ a constitutionally impermissible mandatory presumption or permissive inference as a means of finding beyond a reasonable doubt the intent necessary to commit the crime in question.

A

The Court begins its discussion of mandatory presumptions and permissive inferences by defining those terms. Mandatory presumptions are evidentiary devices that *require* the trier of fact, upon finding one fact ("the underlying fact") to have been established, to find the existence of a second fact ("the presumed fact"). There are two types of mandatory presumptions. "Conclusive" mandatory presumptions leave the trier of fact with no alternative to finding the presumed fact upon finding the underlying fact. "Rebuttable" mandatory presumptions require the trier of fact to find the presumed fact upon finding the underlying fact unless other evidence probative of the pre-

sumed fact negates the existence of the presumed fact. In contrast to mandatory presumptions, permissive inferences are evidentiary devices that *permit*, but do not require, the trier of fact to find the existence of a fact ("the inferred fact") upon finding that the underlying fact has been established.

The constitutional limitations on the use of mandatory presumptions and permissive inferences in the criminal context derive from the rule, first enunciated in *In re Winship*, 397 U.S. 358, 364, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), that a state criminal defendant may not, consistent with the due process clause of the fourteenth amendment, be convicted of a crime except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime. Under this principle, a defendant's constitutional rights are violated if state law creates an evidentiary device that, either by removing a question of fact from the jury's consideration, *see United States v. United States Gypsum Co.*, 438 U.S. 422, 446, 98 S.Ct. 2864, 2878, 57 L.Ed.2d 854 (1978), or by shifting to the defendant the burden of persuasion on a question of fact, *see Mullaney v. Wilbur*, 421 U.S. 684, 703-04, 95 S.Ct. 1881, 1892, 44 L.Ed.2d 508 (1975), relieves the prosecution of its burden of proving beyond a reasonable doubt a particular fact necessary to constitute the crime with which the defendant is charged. Since conclusive mandatory presumptions have precisely the issue-precluding effect condemned in *United States Gypsum*, and since rebuttable mandatory presumptions have precisely the burden-shifting effect condemned in *Mullaney*, mandatory presumptions, whether of the conclusive or re-

buttable variety, are always unconstitutional when used in the criminal context to prove an element of the crime in question. *See Sandstrom v. Montana*, 442 U.S. 510, 520-24, 99 S.Ct. 2450, 2457-2459, 61 L.Ed.2d 39 (1979). However, since a permissive inference expressly leaves the trier of fact free to employ or to disregard the evidentiary device, permissive inferences are unconstitutional only where there is no rational way the trier of fact, absent the legal authorization to do so supplied by the permissive inference, could find the existence of the inferred fact upon having found the existence of the underlying fact. *County Court v. Allen*, 442 U.S. 140, 157, 99 S.Ct. 2213, 2224, 60 L.Ed.2d 777 (1979).[2]

The foregoing principles determine the constitutionality of state laws that either require or allow the trier of fact, upon finding that a criminal defendant performed an act,

2. Prior to the Supreme Court's decision in *County Court v. Allen*, there was considerable doubt concerning the proper standard for determining the constitutionality of a permissive inference when used in the criminal context. Some Supreme Court decisions indicated, as the Supreme Court ultimately held in *County Court v. Allen*, that a criminal permissive inference passes constitutional muster as long as a rational connection exists between the underlying fact and the inferred fact. *See, e.g., Tot v. United States*, 319 U.S. 463, 467-68, 63 S.Ct. 1241, 1244-1245, 87 L.Ed. 1519 (1943). Other decisions intimated that a permissive inference can withstand constitutional scrutiny when used in the criminal context only if demonstration of the underlying fact makes the existence of the inferred fact "more likely than not." *See, e.g., Leary v. United States*, 395 U.S. 6, 36, 89 S.Ct. 1532, 1548, 23 L.Ed.2d 57 (1969). Still other decisions suggested that the correct test for the constitutionality of a criminal permissive inference is whether demonstration of the underlying fact makes existence of the inferred fact likely beyond a reasonable doubt. *See, e.g., Turner v. United States*, 396 U.S. 398, 405-18, 90 S.Ct. 642, 646-653, 24 L.Ed.2d 610 (1970). *See generally Barnes v. United States*, 412 U.S. 837, 841-46, 93 S.Ct. 2357, 2360-2363, 37 L.Ed.2d 380 (1973); Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 Harv.L.Rev. 1187, 1199-1208 (1979).

to find that the defendant intended for his act to have one of its natural and probable consequences. State laws are unconstitutional where they *require* the trier of fact, having found that the defendant performed an act, to find that the defendant intended for that act to have one of its natural and probable consequences. *Sandstrom v. Montana, supra,* 442 U.S. at 521-23, 99 S.Ct. at 2457-2459. A state law creating such a mandatory presumption is not saved from constitutional infirmity if the trier of fact is relieved from the requirement of finding the presumed fact (that is, from finding that the defendant intended for his act to have one of its natural and probable consequences) in cases where the existence of the presumed fact is negated by other evidence probative of the presumed fact; this merely converts the mandatory presumption from the conclusive variety into the rebuttable variety. *Id.* at 524, 99 S.Ct. at 2459. On the other hand, state laws are not unconstitutional where they merely *permit* the trier of fact, having found that the defendant performed an act, to find that the defendant intended for that act to have one of its natural and probable consequences. *See Washington v. Harris,* 650 F.2d 447, 453 (2d Cir. 1981). Such a law, which merely creates a permissive inference, withstands constitutional scrutiny because there is a rational connection between the underlying fact (the defendant's act) and the inferred fact (the defendant's intent that the act would cause one of its natural and probable consequences). *County Court v. Allen, supra,* 442 U.S. at 157, 99 S.Ct. at 2224.

New York law does, and did at the time of both Rivera's and Arroyo's trials, authorize the trier of fact in a criminal trial to use a constitutionally proper permissive inference

such as the Court has just described in order to find that the defendant acted with the requisite criminal intent. *People v. Getch,* 50 N.Y.2d 456, 465-66, 429 N.Y.S.2d 579, 583-84, 407 N.E.2d 425, 429 (1980). However, the trier of fact in a criminal trial is not, under New York law, and was not at the time of either Rivera's or Arroyo's trial, authorized to find the defendant's intent by using a constitutionally impermissible mandatory presumption such as the Court described above. *People v. Thomas,* 50 N.Y.2d 467, 472-73, 429 N.Y.S.2d 584, 587, 407 N.E.2d 430, 433 (1980). In sum, New York law is, and has been at all times relevant to the *Rivera* action and the *Arroyo* action, in accord with the constitutional limitations on the use of evidentiary devices such as mandatory presumptions and permissive inferences in order to find criminal intent.

Rivera and Arroyo do not challenge this view of New York law. Rather, their petitions argue that, notwithstanding the prevailing rule of New York law, the judges at their state trials each charged the jury on New York law in a manner at variance with the federal constitutional limitations on the use of a mandatory presumption as a means of finding criminal intent. The Court, having laid a foundation for doing so by explaining the constitutional limitations on the use of such mandatory presumptions, may now proceed to discuss whether the jury charge given at either Rivera's or Arroyo's trial exceeded these limitations.

B

The standard that this Court must apply in evaluating the constitutional sufficiency of the jury charges given at Rivera's and Arroyo's state trials is whether, considering

the charge as a whole, a reasonable jury could have interpreted the judge's charge in a fashion inconsistent with the Constitution. *Sandstrom v. Montana, supra,* 442 U.S. at 514, 99 S.Ct. at 2454. A charge susceptible of such an interpretation by a reasonable jury so infects the trial of which it is a part that a conviction rendered subsequent to the charge cannot withstand due process attack, *see Cupp v. Naughton,* 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368 (1973), even if the charge was also capable of being understood by a reasonable jury in a manner that comports with the Constitution, *see Leary v. United States, supra* note 2, 395 U.S. at 31-32, 89 S.Ct. at 1545-1546. Judgments of conviction must occasionally be vacated or reversed on this theory where the charge contained only one erroneous instruction. *See, e.g., Cool v. United States,* 409 U.S. 100, 102-03, 93 S.Ct. 354, 356-357, 34 L.Ed.2d 335 (1972). However, a judgment of conviction will not be rendered constitutionally infirm by one deficient instruction if the charge, when considered as a whole, clearly informs the jury of the correct legal principle. *Henderson v. Kibbe,* 431 U.S. 145, 153, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977); *see Cupp v. Naughten, supra,* 414 U.S. at 147, 94 S.Ct. at 400. That is, where there is "no possibility," given the judge's additional instructions, that a reasonable jury could have interpreted the charge as a whole to state a rule of law at odds with the Constitution, a single ailing instruction does not render the charge constitutionally deficient. *Nelson v. Scully,* 672 F.2d 266, 272 (2d Cir. 1982); *see United States v. Robinson,* 545 F.2d 301, 306 n.7 (2d Cir. 1976) (no error if trial judge's charge included additional instructions that "insur[ed]" jury understood correct rule).

Appendix B

The Court first applies these principles to the charge given by the judge at Rivera's trial. In discussing the crime of first-degree manslaughter, the judge at Rivera's trial correctly told the jury that it could only find Rivera guilty of that crime if it found beyond a reasonable doubt that Rivera intended to cause Guy Keyes serious physical injury. However, at the outset of his general charge on intent, the judge instructed the jury that "[a] person is presumed to intend the natural and probable consequences of his act." None of the judge's later instructions expressly qualified the first instruction's clear implication that, once the jury found that serious physical injury to Guy Keyes was a natural and probable consequence of an act performed by Rivera, the jury was then *required* to find that Rivera had the requisite intent to cause Guy Keyes serious physical injury. Thus, this instruction is perfectly consistent with, and reasonably could have been understood by the jury to describe, a constitutionally impermissible conclusive mandatory presumption. *Accord, Washington v. Harris, supra,* 650 F.2d at 453 (judge's instruction that "a person intends . . . the necessary and natural consequences of any act he performs" was "constitutionally defective"); *cf. United States ex rel. Eccleston v. Henderson,* 534 F.Supp. 813, 816-17 (E.D.N.Y. 1981) (no error where trial judge, after instructing jury that "under our law a person is presumed to intend the natural and probable consequences of his acts," explained that "this presumption, like all presumptions, may be accepted or rejected by you"). Under the previously stated principles, the judge's charge was rendered constitutionally infirm by this manda-

tory presumption instruction unless the charge, when considered in its entirety, clearly informed the jury of the correct rule of law, that is, unless the charge clearly informed the jury, contrary to the particular instruction relied on by Rivera, that New York law *permitted*, but did not *require*, the jury to find the requisite intent to cause Guy Keyes serious physical injury if it first found that serious physical injury was a natural and probable consequence of an act performed by Rivera. *But see United States v. Winter*, 663 F.2d 1120, 1144 (1st Cir. 1981) (judge's charge is *always* constitutionally erroneous when it includes a mandatory presumption instruction like that given at Rivera's trial).

The Court begins its analysis of this question by making two observations. First, once a judge gives a single instruction on intent that the jury could reasonably understand to state a constitutionally invalid rule of law, the charge as a whole cannot possibly clearly inform the jury of the correct rule of law, no matter how many accurate instructions on intent the judge previously gave or subsequently gives, unless a reasonable jury would necessarily understand the other instructions to be at odds with the incorrect understanding that the jury reasonably could obtain from the ailing instruction. *See Callahan v. LeFevre*, 605 F.2d 70, 75 (2d Cir. 1979). That is, where the trial judge gives an instruction that is reasonably susceptible of a constitutionally invalid interpretation, and there is no necessary rhetorical inconsistency between such an interpretation of this instruction and the remainder of the judge's charge, it is plain that there is no ground for a

court to hold that the charge as a whole clearly informed the jury of the correct rule of law. *Sandstrom v. Montana, supra,* 442 U.S. at 518-19 n.7, 99 S.Ct. at 2456-2457 n.7; *see, e.g., Getch v. Hammock,* No. CV-80-3363, slip op. at 20-22 (E.D.N.Y. Mar. 3, 1981) (finding that charge as a whole did not clearly inform jury of correct rule of law because charge's permissive language was not necessarily rhetorically inconsistent with the constitutionally invalid interpretation jury reasonably could have given charge's mandatory language), *rev'd on other grounds mem.,* 672 F.2d 900 (2d Cir. 1981) (no constitutional error because judge's charge contained no mandatory language). Second, even if the court is able to identify such a necessary rhetorical inconsistency, it may only declare that the charge as a whole clearly informed the jury of the correct legal rule if the circumstances of the case are such that the jury must have resolved this inconsistency by rejecting the constitutionally invalid interpretation of the ailing instruction. *Sandstrom v. Montana, supra,* 442 U.S. at 525-26, 99 S.Ct. at 2459-2460; *see, e.g., Matarese v. LeFevre,* 514 F.Supp. 128, 132 (E.D.N.Y. 1981) (holding, upon identifying necessary rhetorical inconsistency within charge, that "a reasonable juror could not interpret the [charge] as describing anything other than a permissive inference").

The State, in arguing that the charge as a whole clearly informed the jury at Rivera's trial of the correct rule of law, relies primarily on that part of the judge's general charge on intent where he instructed the jury that "[a] criminal intent may be inferred from all the circumstances of the case." The judge explained this instruction as fol-

lows: "You should consider what [the defendant] allegedly did, what means he allegedly employed, the type of instrument allegedly used, if any, the part of the body allegedly attacked, and all the circumstances. And from these surrounding circumstances you are to determine the intention of the defendant at the time." The State argues, and the Court agrees, that the jury reasonably could have understood this part of the judge's charge to entitle it to use a permissive inference in order to find that Rivera had the intent necessary to commit first-degree manslaughter. However, the Court does not find that this permissive inference instruction was necessarily rhetorically inconsistent with a constitutionally invalid interpretation of the judge's earlier conclusive mandatory presumption instruction. Given that the judge's permissive inference instruction did not contain the "natural and probable consequences" limitation contained in the mandatory presumption instruction, the jury could reasonably have put the two instructions together and concluded that it was (1) required to find the requisite intent if it found that serious physical injury to Guy Keyes was one of the natural and probable consequences of an act performed by Rivera, and (2) permitted to find the requisite intent, regardless of whether serious physical injury to Guy Keyes was one of the natural and probable consequences of an act performed by Rivera, by reference to all the facts and circumstances of the case. In other words, the jury reasonably could have understood the permissive inference instruction to offer it a route to finding the requisite intent that was merely *alternative* to, and hence was perfectly compatible with, the constitutionally

deficient route made available by the conclusive mandatory presumption instruction. Thus, the permissive inference instruction did not necessarily prevent the jury from relying on a constitutionally infirm interpretation of the conclusive mandatory presumption instruction to find that Rivera acted with the requisite intent. *See Sandstrom v. Montana, supra* (finding constitutional violation notwithstanding fact that charge, in addition to telling the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts," instructed jury (*see* Petitioner's Appendix at 36) that "[p]urpose and knowledge are manifested by the circumstances connected with the offense . . . [and] need not be proved by direct evidence, but may be inferred from acts, conduct, and circumstances appearing in evidence").

The State also argues that the judge eliminated any possibility that the jury would understand his charge to describe a constitutionally deficient mandatory presumption when, near the end of his general charge on intent, he instructed the jury that "[u]nder our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the result produced, the intention to effect such result." This argument fails for two reasons. *First*, the jury reasonably could have interpreted this instruction as two separate instructions, the first of which (*i.e.*, "[u]nder our law every person is presumed to intend the natural and inevitable consequences of his own voluntary acts") reiterated the earlier constitutionally infirm conclusive mandatory presumption

instruction, and the second of which (*i.e.*, "and unless such acts were done under circumstances which would preclude the existence of such intent, the jury has a right to infer from the results produced, the intention to effect such result") reiterated the earlier constitutionally sound permissive inference instruction. Read in this fashion, this instruction, like the permissive inference instruction, is not rhetorically inconsistent with a constitutionally invalid interpretation of the conclusive mandatory presumption instruction. *Second*, the jury reasonably could have read this instruction as a single instruction, and concluded that it described a constitutionally impermissible rebuttable mandatory presumption. That is, the jury reasonably could have thought that, if it found that a natural and probable consequence of an act performed by Rivera was serious physical injury to Guy Keyes, this instruction *required* the jury to find that Rivera intended for this consequence to occur, unless other evidence probative of Rivera's intent negated such a finding.[3] If read as a single instruction,

3. The Court recognizes that, if the jury did understand this instruction as a single instruction, it reasonably could have interpreted it to describe a permissive inference; further, since this instruction *does* contain a "natural and probable consequences" limitation, such an interpretation would have been rhetorically inconsistent with a constitutionally invalid interpretation of the earlier conclusive mandatory presumption instruction. The important point is that the jury did not *necessarily* follow this course. Rather, as described in text, the jury had two other reasonable course available to it that each led to a constitutionally impermissible result: (1) the jury reasonably could have interpreted this instruction as two separate instructions, the first of which reiterated the judge's earlier constitutionally infirm conclusive mandatory presumption instruction and the second of which reiterated his earlier constitutionally sound permissive inference instruction; or (2) the jury reasonably could have interpreted this in-

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then, this instruction invited the jury to employ an unconstitutional means of finding the requisite intent, and therefore can hardly be said to have eliminated the possibility that the jury would behave in such a fashion.[4]

The State's argument that the charge at Rivera's trial clearly informed the jury of the correct legal rule also places heavy emphasis on the trial judge's statement that

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struction as a single instruction, but understood it to describe a constitutionally impermissible rebuttable mandatory presumption. Also, the Court observes that the jury could reasonably have concluded (as, incidentally, the Court has after reading it repeatedly) that this instruction is not susceptible of *any* coherent interpretation. If the jury indeed reached such a conclusion, this instruction certainly did not eliminate the possibility that the jury relied on a constitutionally infirm interpretation of the judge's earlier conclusive mandatory presumption instruction to find that Rivera acted with the requisite intent.

4. The foregoing discussion demonstrates the fundamental differences between the charge given at Rivera's trial and the instruction that was at issue in *Washington v. Harris, supra.* As described in text, the *Rivera* action involves one instruction that reasonably could have been understood to describe a constitutionally impermissible conclusive mandatory presumption, and a second instruction that, because it began with mandatory language ("[u]nder our law every person is presumed") and ended with permissive language ("the jury has a right to find"), reasonably could have been interpreted as describing a constitutionally impermissible rebuttable mandatory presumption. In *Washington v. Harris,* the petitioner challenged the following statement by the judge to the jury, "On the question of intent, you may infer that a person intends that which is the natural and necessary and probable consequences of the acts performed by him and unless the act was done under circumstances to preclude the existence of such intent, you have a right to find from the results produced an intention to effect it." *See* 650 F.2d at 450. The Court of Appeals held that this instruction, because it began permissively ("you may infer") and ended permissively ("you have a right to find"), could only have reasonably been understood to state a permissive inference. *Id.* at 453. Thus, while the jury charge at issue in the *Rivera* action offered the jury two constitutionally impermissible routes to a guilty verdict, the judge at Washington's trial did not, in charging the jury on the crime of which Washington was convicted, give the jury a single instruction that reasonably could have been interpreted in a constitutionally invalid fashion.

"the intent with which a crime has been committed rests upon the prosecution to establish it by evidence beyond a reasonable doubt." While, by this instruction, the judge correctly (albeit confusingly) charged the jury on the prosecution's burden of proof on the intent issue, this fact provides no basis for the Court to conclude that the jury could not reasonably have relied on a constitutionally invalid interpretation of the judge's conclusive mandatory presumption instruction. As the Supreme Court stated in *Sandstrom v. Montana, supra,* a beyond-a-reasonable-doubt instruction "is not rhetorically inconsistent with a conclusive or burden-shifting [mandatory] presumption [instruction]." 442 U.S. at 518-19 n.7, 99 S.Ct. at 2456-2457 n.7. Rather, the jury could reasonably have interpreted the two instructions to mean that the conclusive mandatory presumption was a mechanism through which the prosecution could satisfy its burden of proving beyond a reasonable doubt that Rivera intended Guy Keyes serious physical injury. *Accord, United States ex rel. Eccleston v. Henderson, supra,* 534 F.Supp. at 817.

The Court is accordingly unable to conclude that the jury at Rivera's trial would necessarily have understood any of the judge's later instructions to be rhetorically inconsistent with the incorrect understanding that the jury reasonably could have obtained from the judge's earlier conclusive mandatory presumption instruction.[5] There-

5. Even if one of the judge's later instructions had been necessarily rhetorically inconsistent with the constitutionally invalid interpretation that the jury at Rivera's trial reasonably could have given the judge's conclusive mandatory presumption instruction, the Court would not thereby be able to state that the judge's charge as a whole clearly informed the jury of the correct rule of law, because it would

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fore, the Court is unable to find, upon reviewing the judge's charge as a whole, that the jury at Rivera's trial was clearly informed of the correct rule of law notwithstanding the constitutionally infirm conclusive mandatory presumption

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be unable to conclude that the jury necessarily resolved such an inconsistency by rejecting the constitutionally invalid interpretation of the conclusive mandatory presumption instruction. The conclusive mandatory presumption instruction was the judge's first comment on intent and thus occupied a place of great prominence in the judge's charge on intent. Considered as a whole, the judge's charge used mandatory language and permissive language with about equal frequency. The jury did not send out any notes during its deliberations indicating that it was relying on one of the judge's other instructions to the exclusion of the conclusive mandatory presumption instruction. Thus, even if the Court were able to say that the jury necessarily must have either disregarded the constitutionally invalid interpretation of the conclusive mandatory presumption instruction or ignored one of the judge's later instructions, it would be wholly uncertain which of these courses the jury chose. *See Sandstrom v. Montana, supra*, 442 U.S. at 526, 99 S.Ct. at 2460.

The foregoing discussion demonstrates the difference between the *Rivera* action and the case recently faced by the Court of Appeals for this Circuit in *Nelson v. Scully, supra*. In that case, the court assumed for the purposes of argument that *Wainwright v. Sykes, supra*, imposed no bar to Nelson's federal habeas corpus petition, 672 F.2d at 270, and further assumed that the judge at Nelson's trial had given an instruction that, like the mandatory presumption instructions given at Rivera's and Arroyo's trials, reasonably could have been interpreted in a constitutionally invalid manner, *id.* at 271-272. The court held, upon reviewing the charge as a whole in the manner described and undertaken in text, that the judge's other instructions had made it "clear throughout" his charge that New York law permitted, but did not require, the jury to find the requisite intent to kill upon finding that the victim's death was a natural and probable consequence of one of Nelson's acts. *Id.* at 272 (quoting *People v. Green*, 50 N.Y.2d 891, 893, 430 N.Y.S.2d 267, 268, 408 N.E.2d 675, 675 (1980)). In its paragraph explaining this holding, the *Nelson v. Scully* court emphasized that the judge at Nelson's trial, like the judges at Rivera's and Arroyo's trials, correctly instructed the jury (1) that the jury could only find Nelson guilty of murder of it found that Nelson acted with the "intent" to kill the victim, (2) that an "intent" to kill means a "conscious objective" to cause death, and (3) that the prosecution

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instruction. The judge at Rivera's trial thus committed error of constitutional dimension in charging the jury on intent. *Accord, Ramirez v. Jones*, 530 F.Supp. 345, 348-350 (S.D.N.Y. 1981) (holding virtually identical charge to have been constitutionally deficient). *But see Dudley v. Dalsheim*, 526 F.Supp. 88, 91 (S.D.N.Y. 1981) (holding similar charge to have been constitutionally adequate). This error requires that Rivera's conviction of first-degree manslaughter be vacated unless the error may be found harmless.[6] Before dealing with the harmless error question,

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was required to prove such an intent beyond a reasonable doubt. 672 F.2d at 272-273. However, as the Court has explained in text, and as the *Nelson v. Scully* court must have realized, instructions such as these are perfectly consistent with, and hence do not necessarily incline a reasonable jury to disregard, a mandatory presumption instruction. The Court accordingly does not believe that the outcome in *Nelson v. Scully* depended on the fact that the trial judge correctly instructed the jury on the elements of the crime in question, on the meaning of "intent," and on the prosecution's burden of persuasion. Rather, since the majority opinion in *Nelson v. Scully* is substantially informed by the view that the trial judge, instead of giving the standard "boiler-plate" charge on intent, repeatedly "hammered" at the jury with permissive language, 672 F.2d at 272, the Court believes that the *Nelson v. Scully* decision is better understood to depend on the court's view that the trial judge's charge on intent contained permissive language that was rhetorically inconsistent with the judge's mandatory language, and, more importantly, that the charge featured this permissive language significantly more prominently and frequently than the mandatory language. Since the judge at Rivera's trial gave what can only be described as a "boiler-plate" charge on intent, and since this charge did not use permissive language with greater frequency and prominence than it used mandatory language, *Nelson v. Scully* would not control the adjudication of Rivera's petition even if the judge at Rivera's trial had used permissive langauge in his intent charge that was necessarily rhetorically inconsistent with his mandatory language.

6. The State's other arguments in the *Rivera* action border on being frivolous. First, the State argues that *Sandstrom v. Montana, supra*, a decision heavily relied upon by Rivera, should not be given

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however, the Court discusses the constitutional sufficiency of the intent charge given at Arroyo's trial.

The judge at Arroyo's trial, in similar fashion to the judge at Rivera's trial, told the jury that it could only find Arroyo guilty of attempted murder if it found beyond a reasonable doubt that Arroyo intended to cause the death of Raymond Bernard. However, in her final instruction to the jury on the general subject of intent, the judge told the jury that "people are presumed to intend the natural, probable and logical consequence of their acts." The jury could reasonably have understood this instruction to state that, if it found that the death of Raymond Bernard was a natural, probable and logical consequence of an act performed by Arroyo, the jury was then *required* to find that Arroyo had the requisite intent to cause the death of Raymond Bernard. This portion of the judge's charge is thus perfectly consistent with, and reasonably could have been un-

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retroactive effect and thus cannot form the basis for vacating any conviction that occurred before its enunciation in 1979. However, since the decisions on which *Sandstrom v. Montana* rests were given retroactive effect, *see Hankerson v. North Carolina*, 432 U.S. 233, 240, 97 S.Ct. 2339, 2342, 53 L.Ed.2d 306 (1977) (giving retroactive effect to *Mullaney v. Wilbur, supra*); *Ivan V. v. City of New York*, 407 U.S. 203, 204, 92 S.Ct. 1951, 1952, 32 L.Ed.2d 659 (1972) (giving retroactive effect to *In re Winship, supra*), the Court is convinced that *Sandstrom v. Montana* must be given retroactive effect as well. *Accord, Dietz v. Solem*, 640 F.2d 126, 130-31 (8th Cir. 1981); *People v. Getch, supra*, 50 N.Y.2d at 464, 429 N.Y.S.2d at 582-83, 407 N.E.2d at 428. Second, the State argues that the Court should, in determining how the jury reasonably could have interpreted the judge's instruction that "[a] person is presumed to intend the natural and probable consequences of his act," be attentive to a purported difference between the legal and dictionary meanings of the word "presume." The Court finds it incredible that the State would make this argument, in light of the fact that the Supreme Court's decision in *Sandstrom v. Montana, supra*, was in large measure based on the *identity* between the legal and dictionary definitions of the word "presume." *See* 442 U.S. at 517, 99 S.Ct. at 2455.

derstood by the jury to describe, a constitutionally impermissible conclusive mandatory presumption. Under the previously stated principles, the judge's charge was rendered constitutionally infirm by this mandatory presumption instruction unless the charge, when considered in its entirety, clearly informed the jury of the correct rule of law, that is, unless the charge as a whole clearly informed the jury, contrary to this particular instruction, that New York law *permitted*, but did not *require*, the jury to find the requisite intent to cause the death of Raymond Bernard if it first found that the death of Raymond Bernard was a natural and probable consequence of an act performed by Arroyo.

In arguing that the charge at Arroyo's trial, when considered as a whole, clearly informed the jury of the correct rule of law, the State relies on the undisputable facts that (1) the jury reasonably could have understood a different portion of the charge as entitling it to use a permissive inference to find the requisite intent, and (2) the judge clearly told the jury that the prosecution bore the burden of proving beyond a reasonable doubt that Arroyo intended to cause the death of Raymond Bernard. The Court's analysis of this argument is guided by the same two observations that predicated the Court's analysis of the similar argument made by the State in the context of the *Rivera* action. Once again, the State's argument fails because the constitutionally invalid interpretation that the jury reasonably could have given the mandatory presumption instruction was not necessarily rhetorically inconsistent with any of the other instructions that the judge gave on intent. First, the judge's mandatory presumption instruction was not, if interpreted in the constitutionally infirm manner that the

Court has hypothesized, rhetorically inconsistent with her permissive inference instruction; to explain, whereas the mandatory presumption described by the judge could only be applied if the jury first found that the death of Raymond Bernard was a "natural, probable and logical" consequence of an act performed by Arroyo, the permissive inference described by the judge was available upon the jury's consideration of "all the [relevant] evidence which may indicate intent." Nor was the constitutionally invalid interpretation of the mandatory presumption instruction inconsistent with the judge's beyond-a-reasonable-doubt instruction, because the jury could reasonably have thought that the mandatory presumption instruction provided the prosecution with a mechanism for meeting the burden of proof set forth in the beyond-a-reasonable-doubt instruction.[7]

7. Even if either the judge's permissive inference instruction or her beyond-a-reasonable-doubt instruction had been necessarily rhetorically inconsistent with the constitutionally invalid interpretation that the jury at Arroyo's trial reasonably could have given the judge's mandatory presumption instruction, the Court would not thereby be able to state that the judge's charge as a whole clearly informed the jury of the correct rule of law, because it would be unable to conclude that the jury necessarily resolved such an inconsistency by rejecting the constitutionally invalid interpretation of the mandatory presumption instruction. The mandatory presumption instruction, being the last instruction that the judge gave to the jury, occupied the most prominent position in the judge's charge of any of her instructions on intent. Considered as a whole, the judge's charge did not use permissive language with significantly greater frequency than it used mandatory language. The Court notes that the jury deliberated for over six hours without being able to decide the intent question, then received the mandatory presumption instruction, and then convicted Arroyo on all counts twenty-five minutes later. This sequence hardly indicates that the jury excluded the mandatory presumption instruction from its deliberations. Thus, even if the Court were able to say that the jury necessarily must have either disregarded the constitutionally invalid interpretation of the mandatory presumption instruction or ignored one of the judge's earlier instructions, it would be wholly uncertain which of these courses the jury chose. *See Sandstrom v. Montana, supra*, 442 U.S. 526, 99 S.Ct. 2460, and the discussion of *Nelson v. Scully, supra* in note 5, *supra*.

Thus, neither the judge's permissive inference instruction nor her beyond-a-reasonable-doubt instruction provides a basis for the Court to conclude that the judge's charge, when considered as a whole, clearly informed the jury that New York law *permitted*, but did not *require*, the jury to find the requisite intent to cause the death of Raymond Bernard, if it first found that the death of Raymond Bernard was a natural and probable consequence of an act performed by Arroyo.

The judge at Arroyo's trial thus committed error of constitutional dimension in charging the jury on the subject of intent.[8] Having therefore found that both Rivera's trial

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8. The State's other arguments in the *Arroyo* action border on being frivolous. First, the State argues that the instruction challenged by Arroyo, to wit, "people are presumed to intend the natural, probable and logical consequence of their acts," materially differs from the instruction held invalid by the Supreme Court in *Sandstrom v. Montana, supra*, which instruction stated that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *See* 442 U.S. at 513, 99 S.Ct. at 2453. Specifically, the state contends that the instruction at issue in the *Arroyo* action, unlike the instruction considered in *Sandstrom v. Montana*, was not characterized by the trial judge as a principle of law. Apparently, the State's argument is that, since the judge at Arroyo's trial prefaced her challenged instruction with the phrase "[b]y agreement I can tell you that," the jury must have interpreted this instruction as something akin to a new stipulated fact rather than a rule of law. Accepting for present purposes the dubious proposition that the instruction would pass constitutional muster if the jury did understand it in this fashion, the Court is unable to conclude that this was indeed the jury's understanding. In the Court's view, it is at least equally likely that the jury understood the judge's prefatory comment to mean that the parties had agreed upon a correct statement of a principle of law.

Second, the State contends that where, as here, the defendant's act has merely caused a person to be wounded, a mandatory presumption instruction such as the judge gave at Arroyo's trial only requires the jury, if it finds that the wounding was a natural and probable consequence of the act, to find that the defendant intended to *wound*

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and Arroyo's trial were infected by constitutional errors, the Court turns to the question of whether either of these errors may be found to have been harmless.

II

The Supreme Court has imposed narrow limitations on the ability of a reviewing court to conclude that a federal constitutional error committed during a criminal trial was "harmless." Some constitutional rights are so basic to a fair trial that their infraction may never be treated as harmless error. *Holloway v. Arkansas*, 435 U.S. 475, 489, 98 S.Ct. 1173, 1181, 55 L.Ed.2d 426 (1978). Those federal constitutional violations that do not fall in the category of infractions that demand "automatic reversal" may be deemed nonprejudicial in a given case, but only if the reviewing court is able to declare a belief that the violation in question was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); *Forman v. Smith*, 633 F.2d 634, 642

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the victim. Thus, the State takes the position that the jury at Arroyo's trial, while it could have used the instruction to find that Arroyo intended to cause Raymond Bernard serious injury, could not have used the instruction to find that Arroyo intended to cause Raymond Bernard's *death*. The obvious flaw in this argument is that the jury did not necessarily interpret the instruction in question in the fashion suggested by the State. In the Court's view, the jury could reasonably have understood this instruction to state that, if the jury found that the death of Raymond Bernard, though it did not actually occur, was one of the natural and probable consequences of an act performed by Arroyo, the jury was required to find in turn that Arroyo intended to cause the death of Raymond Bernard. Plainly, if the jury adopted this interpretation rather than the one advanced by the State, the jury may indeed have used the challenged instruction to find that Arroyo intended to cause Raymond Bernard's death.

(2d Cir. 1980), *cert. denied*, 450 U.S. 1001, 101 S.Ct. 1710, 68 L.Ed.2d 204 (1981).

The Supreme Court has not yet decided whether an error such as occurred at the trials of Rivera and Arroyo may ever be declared harmless. *McKenzie v. Montana*, 449 U.S. 1050, 1052 n.2, 101 S.Ct. 626, 628 n.2, 66 L.Ed.2d 507 (1980) (Marshall, J., dissenting from denial of certiorari); *see Sandstrom v. Montana, supra*, 442 U.S. at 526-27, 99 S.Ct. at 2460-2461 (expressly leaving question open). However, in *Washington v. Harris, supra*, the Court of Appeals for this Circuit reversed a district court decision granting a habeas corpus petition based on the same theory as the petitions filed by Rivera and Arroyo; the Court remanded the action for consideration of whether the erroneous instruction was harmless. 650 F.2d at 453-54. In this Circuit, then, constitutional violations such as the Court is presently considering may, in an appropriate case, be declared harmless. *Accord, Nelson v. Scully, supra*, 672 F.2d at 279 (Oakes, J., dissenting). *See also United States v. Williams*, 665 F.2d 107, 110 (6th Cir. 1981); *United States v. Winter, supra*, 663 F.2d at 1144-45; *McGuinn v. Crist*, 657 F.2d 1107, 1108-09 (9th Cir. 1981); *Jacks v. Duckworth*, 651 F.2d 480, 485-87 (5th Cir. 1981); *Dietz v. Solem, supra* note 6, 640 F.2d at 131 (all holding that constitutionally infirm mandatory presumption instructions similar to those at issue here may be found harmless).

In order to conclude that either Rivera or Arroyo was not prejudiced by the federal constitutional violation that occurred at his trial, the Court must, as noted, be able to declare a belief that this violation was harmless beyond a

reasonable doubt. *Chapman v. California, supra,* 386 U.S. at 24, 87 S.Ct. at 828. There is some confusion as to the proper application of *Chapman's* reasonable-doubt standard where, as here, the putatively harmless constitutional error was created by a jury charge that reasonably could have been interpreted to describe a constitutionally invalid mandatory presumption. One line of cases supports a rule that a reviewing court should determine whether such an error was harmless by asking if, given the evidence in its entirety, the jury would beyond a reasonable doubt have found the presumed fact if the mandatory presumption instruction had not been given. *See, e.g., Jacks v. Duckworth, supra,* 651 F.2d at 487 (error identical to those at issue here found harmless because evidence was "overwhelming" that defendant acted with the requisite intent). A second line of cases states that a reviewing court faced with such an error should inquire whether it is certain beyond a reasonable doubt that the jury did not find the presumed fact by applying the mandatory presumption that it reasonably could have understood the judge's charge to describe. *See, e.g., United States v. Williams, supra,* 665 F.2d at 110. The decision of the Supreme Court in *County Court v. Allen, supra,* provides the complete answer to this question. There the Court stated that "it [is] irrelevant in analyzing a mandatory presumption, but not in analyzing a purely permissive [inference], that there is ample evidence in the record other than the presumption to support a conviction." 442 U.S. at 160, 99 S.Ct. at 2226. This Court therefore holds, in accordance with the second of the above-cited lines of cases, that harmless error analysis of a constitutionally invalid mandatory presumption instruction should proceed

from an inquiry whether the record permits the reviewing court to conclude beyond a reasonable doubt that the jury did not apply the presumption in arriving at its verdict. *See McKenzie v. Montana, supra,* 449 U.S. at 1055, 101 S.Ct. at 629 (Marshall, J., dissenting from denial of certiorari) ("court must ask whether the defective instruction may have contributed to the jury verdict" in assessing whether erroneous mandatory presumption instructions such as were given here were harmless).

Thus, the question to be answered in both the *Rivera* action and the *Arroyo* action is whether the Court is certain beyond a reasonable doubt that the jury did not find the intent element of the crimes in question by concluding that it was required, having found that the defendant performed an act having certain natural and probable consequences, to proceed to find that the defendant intended those consequences. The Court is frank to say that, in light of the general verdicts that are usually rendered in criminal trials, it would expect to have the requisite degree of certainty that a mandatory presumption instruction was harmless only in an exceptional case. *See Note, Harmful Use of Harmless Error in Criminal Cases,* 64 Cornell L.Rev. 538, 553-55 (1979).[9] For the reasons that follow, the Court

9. There are, to be sure, some cases where a reviewing court could indeed be certain beyond a reasonable doubt that an error such as occurred at Rivera's and Arroyo's trials did not affect the jury's verdict in the fashion described above. For example, a reviewing court would have the requisite certainty where the defendant admitted that he intentionally murdered the victim but claimed that he did so in self-defense. *Washington v. Harris, supra,* 650 F.2d at 453-54; *see, e.g., United States ex rel. Tsirizotkis v. LeFevre,* 534 F.Supp. 40, 42 (E.D.N.Y. 1981), *aff'd mem.,* No. 81-2107 (2d Cir. Sept. 22,

(footnote continued on next page)

concludes that neither the *Rivera* action nor the *Arroyo* action is a case of this variety.

The State's position on the harmless error question is based on its assertion that the intent issue, while not expressly conceded by Rivera and Arroyo at their trials, was not seriously contested by them either. Apparently, the State believes that an error such as occurred at Rivera's and Arroyo's trials must always be declared harmless unless the defendant, either by direct testimony or the argument of counsel, has affirmatively advanced the intent issue. This argument, if accepted, would completely undermine that rationale for holding that mandatory presumption instructions are constitutionally infirm. It would be the height of absurdity for a reviewing court (1) to hold that a trial judge's charge was constitutionally invalid because it contained a rebuttable mandatory presumption instruction that shifted the prosecution's burden of persuasion on the intent issue to the defendant, but then (2) to call the error harmless because the defendant did not vigorously contest the intent issue. The whole premise for the constitutional attack on such mandatory presumption instruc-

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1981). Also, a reviewing court should find a mandatory presumption instruction harmless with respect to any count that does not include among its elements the intent that the mandatory presumption instruction invited the jury to find. *See, e.g., Holloway v. McElroy*, 632 F.2d 605, 635 (5th Cir. 1980), *cert. denied*, 451 U.S. 1028, 101 S.Ct. 3019, 69 L.Ed.2d 398 (1981); *United States v. Continental Group, Inc.*, 603 F.2d 444, 464 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032, 100 S.Ct. 703, 62 L.Ed.2d 668 (1980). In these two types of cases, either intent was never a legal issue with respect to the crime charged or the defendant himself made a concession that removed intent as an issue, leaving the reviewing court certain beyond a reasonable doubt that the jury's verdict was not arrived at by use of the mandatory presumption instruction.

tions is that they shift the burden of persuasion to the defendant on an issue with respect to which the defendant is perfectly entitled to prevail even if he does nothing.[10] In the Court's view, then, where the defendant has not expressly conceded that he acted with the requisite intent, harmless-error analysis of mandatory presumption instructions such as the judges gave at Rivera's and Arroyo's trials should not depend on how vigorously the defendant contested the intent issue. Instead, the proper inquiry is whether the reviewing court is certain beyond a reasonable doubt that the jury did not employ the mandatory presumption instruction in making its finding that the defendant had the requisite intent. *Accord, Burton v. Bergman*, 649 F.2d 428, 432 (6th Cir. 1981); *Dietz v. Solem, supra* note 6, 640 F.2d at 131. *But see United States v. Winter, supra*, 663 F.2d at 1144 (unconstitutional mandatory presumption instruction harmless because "appellants are not claiming that they did not intend the natural and probable or ordinary consequences of their acts"); *McGuinn* v. *Crist, supra*, 657 F.2d at 1108-09 (unconstitutional mandatory presumption instruction harmless "in the absence of any

10. A similarly illogical result would be for a reviewing court to find a conclusive mandatory presumption instruction constitutionally infirm because it entirely removed the element of intent as a factual issue, but then to call the error harmless because of the defendant's failure to ask the jury not to find that fact. Aside from the illogic that would inhere in a decision condemning the defendant's failure to litigate a factual question that the judge ultimately removed from the jury's consideration, such a holding would neglect the principle that the defendant is not required to do anything at all to be entitled to a jury determination of each element of the crime charged, and would ignore the fact that the defendant occasionally prevails at trial on an issue as to which he has neither offered testimony nor made argument.

positive contention" by the defendant that he lacked requisite intent); *United States ex rel. Eccleston v. Henderson, supra,* slip op. at 9-10 (unconstitutional mandatory presumption instruction harmless because at trial "there was . . . no real question about intent").

Upon engaging in this inquiry in the context of the *Rivera* action, the Court is unable to declare the error committed at Rivera's trial to have been harmless because it is unable to find beyond a reasonable doubt that the mandatory presumption instruction was not employed by the jury in reaching its guilty verdict on the first-degree manslaughter count. In order to find Rivera guilty of first-degree manslaughter, the jury was required to find (1) that Rivera caused the death of Guy Keyes, and (2) that Rivera, in so doing, intended to cause Guy Keyes serious physical injury. At his trial, Rivera vigorously contested the first of these elements by testifying that he never stabbed Guy Keyes. However, adoption of this defense did not require Rivera to concede that he had intended to cause Guy Keyes serious physical injury. Indeed, Rivera, by denying that he had pursued Guy Keyes with the intent of stabbing him, contested this element as well. At the conclusion of the trial, then, the issue of whether Rivera intended to cause Guy Keyes serious physical injury was submitted to the jury for its determination. The jury, since it found Rivera guilty of first-degree manslaughter, plainly found that Rivera did have this intention. Given the fact that the judge gave the mandatory presumption instruction as the first sentence of his general charge on intent, and then reiterated this instruction at the end of his general charge

on intent, there is simply no way the Court can say that it is certain beyond a reasonable doubt that the jury did not employ the mandatory presumption instruction to arrive at its finding that Rivera intended to cause Guy Keyes serious physical injury. The Court is thus unable to find beyond a reasonable doubt that the error committed at Rivera's trial did not affect the jury's verdict, and accordingly may not declare that error to have been harmless.

Turning to the *Arroyo* action, the Court reaches a similar conclusion. In order to find Arroyo guilty of attempted murder, the jury was required to find (1) that Arroyo fired a loaded gun at Raymond Bernard, thereby causing Raymond Bernard to be wounded, and (2) that Arroyo, in so doing, intended to cause the death of Raymond Bernard. At his trial, Arroyo placed both of these elements in issue. Sue Lydia Pratts' testimony that Arroyo never fired a gun at all created an issue with respect to the first element. Arroyo's own testimony that he had no recollection of firing a gun created an issue whether Arroyo had, in the short period of time involved, formed the intent to kill constituting the second element. Thus, Arroyo did not ever concede that he had intended to cause the death of Raymond Bernard. At the conclusion of the judge's charge, then, this issue was submitted to the jury for its determination. The jury, since it found Arroyo guilty of attempted murder, plainly found that Arroyo did intend to cause the death of Raymond Bernard. Given that the judge gave the mandatory presumption instruction in response to a specific jury request, after six and one-half hours of deliberation, for additional instructions on intent, and that the jury's ver-

dict was rendered only twenty-five minutes after the judge gave the mandatory presumption instruction, there is simply no way the Court can say that it is certain beyond a reasonable doubt that the jury did not employ the mandatory presumption instruction to arrive at its finding that Arroyo intended to cause the death of Raymond Bernard. The Court is thus unable to find beyond a reasonable doubt that the error committed at Arroyo's trial did not affect the jury's verdict on the attempted murder count, and accordingly may not declare the error to have been harmless with respect to that count.

Conclusion

Rivera and Arroyo have shown that the judges at their state trials each committed error of constitutional dimension in instructing the jury on the subject of intent. The Court is unable to find either error to have been harmless. Therefore, the Court concludes that the petitions filed by Arroyo and Rivera must be granted.

The Court is frank to say that it has not reached this decision easily. A federal district judge does not lightly declare that two justices of the Supreme Court of the State of New York have committed trial errors of constitutional dimension and that the New York appellate courts have missed several opportunities to correct these errors. Moreover, while no decision by the Court of Appeals for this Circuit controls this Court's adjudication of Rivera's and Arroyo's petitions, the Court is well aware that the Court of Appeals has never affirmed a district court decision that granted a habeas corpus petition in reliance on *Sandstrom v. Montana.*

However, while these considerations weigh heavily on the Court's mind, the Court is bound to follow the decisions of the United States Supreme Court. *Sandstrom v. Montana* teaches that, if the jury charge at a defendant's trial included a mandatory presumption instruction on the subject of intent, a reviewing court must vacate the defendant's conviction unless it is able to state a belief either (1) that the jury, upon hearing the judge's charge as a whole, could not reasonably have interpreted the charge to state a constitutionally impermissible rule of law, or (2) that any constitutional error that did occur was harmless beyond a reasonable doubt. After a careful consideration of the facts relevant to the *Rivera* action and the *Arroyo* action, the Court has concluded that it cannot honestly and in good conscience state such a belief with respect to either action.

Accordingly, the petitions filed in 80 Civ. 7447(RJW) and 81 Civ. 1280(RJW) are both granted. Rivera is entitled to a new trial on the first-degree manslaughter count of which he was convicted; he shall be released from custody if he is not retried within sixty (60) days of the date of this decision. Arroyo is entitled to a new trial on the attempted murder count of which he was convicted; he shall be released from custody if not retried within sixty (60) days of the date of this decision.

It is so ordered.

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FILED
OCT 29 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

1982 TERM

NO. 82-521

EVERETT JONES, Superintendent,
Great Meadow Correctional Facility,
and ROBERT ABRAMS, Attorney General
of the State of New York,

Petitioners,

-against-

PEDRO ARROYO,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the decision of the Court of Appeals that respondent's due process rights were violated by the State trial court's supplemental instruction, given in response to the jury's third request for clarification of the law of intent, that "people are presumed to intend the natural, probable and logical consequence of their acts," should be reviewed by this Court.

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APPENDIX C

Decision of the Supreme Court, New York County, denying respondent's motion to set aside his conviction..... C1

CASES:

Bollenbach v. United States, 326 U.S. 607 (1946)..... 12

Connecticut v. Johnson, 50 U.S.L. Wk. 4368 (1982)..... 11

Henderson v. Kibbe, 443 U.S. 145 (1977)..... 10

In re Winship, 397 U.S. 358 (1970)..... 8

Ramirez v. Jones, 683 F.2d 712 (2d Cir. 1982), cert. pending sub nom, Jones v. Ramirez, No. 82-584..... 11

Sandstrom v. Montana, 442 U.S. 510 (1979)..... 5

Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982)..... 12

OPINIONS BELOW

The opinions of the district and circuit courts are set forth in the appendix to the Petition. (The Circuit Court opinion, not officially reported when the Petition was filed, appears at 685 F.2d 35 [2d Cir. 1982]; citation to this opinion will be both to petitioner's appendix and the official report.) The opinion of the State court trial judge on the motion to vacate respondent's conviction is set forth in Appendix C, infra.

STATEMENT OF THE CASE

I. The Trial

A. The Prosecution Case

On April 13, 1972, several New York City police officers received a radio run of a "burglary in progress" at a music store on Third Avenue between 117th and 118th Streets in the Borough of Manhattan (283-86, 310, 329-30).[1]

Responding to that location, the officers saw three men walking out of a store. One man, respondent Pedro Arroyo, was stopped and asked to return to the store (GLICKSTEIN: 286-89). Mr. Arroyo initially complied with this request. Suddenly, however, as more officers appeared on the scene, he started running, and, according to two of them, pointed a gun back across his shoulder and fired once or twice at one of the officers from a distance of from five to seven feet (GLICKSTEIN: 290-91, 295-99; BERNARD: 427).

After further shots were exchanged, respondent Arroyo shouted, "I'm hit. I give up" (GLICKSTEIN: 300-

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[1] Parenthetical references are to pages of the trial minutes.

05). Mr. Arroyo was then arrested and taken to a hospital where he was treated for gunshot wounds of the chest, back, thigh, foot, wrist, and finger (496).

Police Officer RAYMOND BERNARD, who testified that he had been hit in the chest at the outset of the shooting by something that "felt like a rock" (427), later discovered that his gun handle was broken and that he had "a line, a scar like... on [the] hand from the tip of [the] finger to the heel of [the] hand." He also found a rip in the right chest area of his jacket (433-34). Officer Bernard was given some ointment and a tetanus inoculation for the scratch on his hand (444-45, 495).

B. The Defense Case

PEDRO ARROYO testified that his memory surrounding the shooting was sketchy due to the multiple injuries he sustained. He did recall, however, having been accosted by a gun-wielding stranger, who had a second weapon at his waistline (609). Mr. Arroyo, previously unarmed, remembered seizing this weapon and starting to run; he did not remember whether he had fired it (611-13, 622-23).

ANNA COLAZO and SUE LYDIA PRATTS testified that respondent did not have a gun and that all the shooting was done by the police (COLAZO: 520-23, 525-26; PRATTS: 546-48, 597-98, 603, 606).[2]

C. Charge, Deliberations, Verdict, and Sentence

The trial judge charged the jury on attempted murder and four lesser-included counts. She told the jury that an essential element of the top count was that "[Pedro Arroyo be shown to have acted] with intent to cause the death of Raymond Bernard" (759). Defining that intent,

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2 Ms. Colazo had, however, given a pre-trial statement to a defense investigator indicating that Mr. Arroyo had drawn a gun as he ran past her building on 117th Street (533).

she said:

> ... under our law, a person acts intentionally with respect to attempting to cause the death of another person when the alleged perpetrator's conscious objective is to cause such death....of course, we all recognize that an intention is a subjective matter and it depends on the operation of an individual's mind nonetheless it is possible to make a finding of intention based on objective actions of the alleged perpetrator; in fact, this is the only method that we can use in determining intention since we cannot get into the mind of the alleged perpetrator. Therefore, in your deliberation, you may use the defendant's objective action as a determining factor in deciding whether or not he acted intentionally.
>
> You may also refer to all the other evidence which may indicate intent or not indicate intent (760-61).

During its deliberations, the jury returned to the courtroom several times with questions. Once, it requested the testimony of Officer Bernard. Thereafter, it asked to rehear "the law and the interpretation of the [attempted murder] charge" (800). After further deliberation, it returned to the courtroom to ask, "[d]oes shooting at a police officer necessarily constitute attempted murder" (803).

The last communication from the jury was sent in six and one-half hours after it received the case.[3] It stated:

> We have reached agreements on four charges and divided on the fifth one, to assist us with the latter, we would seek further classification [sic] of the words "conscious intent" (810).

The State concedes that this unresolved charge was the top count of attempted murder.

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[3] See Arroyo v. Jones, 685 F.2d 35, 37 (2d Cir. 1982); petitioner's appendix at 5a.

In response to the prosecutor's suggestion (to which defense counsel had "no opposition" [809]), the judge delivered a supplemental instruction on intent which charged the jury for the first time -- in the instruction's final sentence -- that:

> "By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts (810). 4/

The verdict convicting respondent on all counts was announced twenty-five minutes later.[5]

II. State Post-Conviction Proceedings

In 1977, on direct appeal from the judgment of conviction and its mandatory minimum sentence of fifteen years to life, Mr. Arroyo relied on decisions from the Second Circuit[6] in arguing that the supplemental charge nullified the prosecution's obligation to prove intent and shifted the burden of proof on that element, thereby denying him due process of law. New York's appellate courts rebuffed this argument.

In 1980, respondent filed a motion to vacate his conviction. This motion was based on the intervening decision of Sandstrom v. Montana, 442 U.S. 510 (1979), which held that a charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violated due process because a reasonable juror might interpret such a charge as "constitut[ing] either a burden-shifting presumption..., or a conclusive pre-

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4 Other language in the supplemental charge tracked the principal charge (compare 810 with 760-61).

5 See Arroyo v. Jones, 685 F.2d 35, 38 (2d Cir. 1982); petitioner's appendix at 6a.

6 Both parties to the appeal agreed that the supplemental charge represented a correct statement of New York law. Defense Brief in the Appellate Division, First Department, at 31; Prosecution Brief, at 43.

sumption." Id., at 524.

In a decision denying the motion on the merits (see Appendix C, infra), the original trial judge explicitly discounted trial counsel's failure to object to the supplemental charge.[7] After leave for a further appeal was denied, Mr. Arroyo turned to the federal courts.

III. Federal Proceedings

Respondent Arroyo's petition for a writ of habeas corpus was granted in the Southern District of New York on February 11, 1982. Upon the State's appeal, the Court of Appeals for the Second Circuit unanimously affirmed the reasoning of the District Court.

In preliminarily observing that all the Second Circuit's previous Sandstrom cases had involved presumption language appearing in the trial court's principal charge, the Court of Appeals distinguished Mr. Arroyo's case from every predecessor in the Circuit in that it, alone, involved language in a supplemental charge (petitioner's 8a; Arroyo v. Jones, supra, 685 F.2d at 38). In addition, however, and on the question of the charge-language itself, the Circuit Court noted that the State did not seriously contend that the portion of the challenged supplemental instruction was different from the type of instruction found invalid in Sandstrom, (petitioner's 8a; Arroyo v. Jones, supra, 685 F.2d at 38-

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7 "... no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right. . . . While in the instant case, the defendant moves under [New York Criminal Procedure Law] §440.10(h) to vacate his 1973 conviction on the ground of deprivation of a fundamental constitutional right, although enunciated by the Supreme Court six years after his conviction, he may not be barred from the making of such a motion because he failed to make objection and affirmatively declared he had no opposition to the questioned instruction." See appendix, infra, at 10c.

39). Then, focusing on the distinctive factual aspects of the Arroyo jury's deliberations, the Circuit Court turned to the State's main contention that this instruction, read in light of the charge as a whole, could not have deprived respondent of the presumption of innocence:

> ...it is all very well as a general matter for the State to urge us to evaluate the effect of presumption language in light of the charge as a whole. But when the jurors have so little comprehended the unobjectionable initial charge that they have found it necessary to ask three times for clarification, it would be decidedly dense of us to assume that the unobjectionable initial charge, as to which enlightenment was requested, itself enlightened the jury as to the real meaning of the improper enlightenment (petitioner's appendix at 11a-12a; Arroyo v. Jones, supra, 685 F.2d at 40).

The Circuit Court opinion was no less pointed in its discussion of the State's related claim that the supplemental instruction was harmless:

> On the record before us there is every reason to believe that the court's presumption language made a special impression on jurors. It was the last sentence they heard before returning for their final minutes of deliberation. It was a brief and pointed statement. And, most importantly, it gave them a way to decide the issue that had caused them, first, to ask for an interpretation of the original instructions on attempted murder, second, to ask if a shot at a police officer necessarily evinced an attempt to murder, and third, to ask for "further cla[r]ification of the words 'conscious intent'." In light of this repeated questioning over the first six and one-half hours of deliberations, and in light of the jury's decision on the attempt count less than one-half hour after having heard the improper charge, it seems highly likely that the supplemental charge was in the forefront in the jurors' minds (petitioner's 10a-11a; Arroyo v. Jones, supra, 685 F.2d at 39-40).

Finally, the Circuit Court also rejected the argument put forward by the State that Mr. Arroyo's trial had not significantly raised the issue of intent:

> ...the issue as to intent to murder was highlighted by Arroyo's testimony that he had merely tried to protect himself by knocking Bernard aside and fleeing, and that he did not remember firing a gun. Thus the trial testimony raised a question as to intent, and the jury's inquiries during its deliberations reveal that it had substantial uncertainty as to whether the State had proven intent to murder beyond a reasonable doubt (petitioner's appendix at 12a; Arroyo v. Jones, supra, 685 F.2d at 40).

REASONS FOR DENYING THE WRIT

In Sandstrom v. Montana, 442 U.S. 510 (1979, this Court unanimously held that a charge that "the law presumes that a person intends the ordinary consequences of his voluntary acts" violates due process. Any reasonable juror, the Court pointed out, could easily interpret such language as "constitut[ing] either a burden-shifting presumption..., or a conclusive presumption" (id., at 524) and either of these eventualities, in turn, was constitutionally impermissible because both relieved the prosecution of the burden of proof enunciated in In re Winship (397 U.S. 358 [1970]) on the critical question of the accused's intent. In respondent Arroyo's state trial, the jury was charged that "people are presumed to intend the natural, probable and logical consequence of their acts." The State largely concedes that this presumption language is constitutionally indistinguishable from similar phrasing in Sandstrom. Because the sequence of jury deliberations below confirms the devastating impact upon the jurors of this improper charge language, the lower federal courts were clearly

correct in vacating respondent's conviction. For the same reason, this Court should deny the State's petition for certiorari.

As found by the Second Circuit, examination of the trial record here demonstrates the substantial likelihood that the jury's verdict was a direct product of the court's unconstitutional presumption charge. Over a period of six and one-half hours of deliberations, Pedro Arroyo's jury sent in several notes which showed that the jury was not only focused on, but, indeed, had persistent doubts about, the sufficiency of the evidence of Mr. Arroyo's intent to murder Officer Bernard. Then, when a final note asked for further clarification of the element of intent in relation to the attempted murder count, the jury was given the charge language set forth above. A guilty verdict followed twenty-five minutes later. On these facts, it would be decidedly dense, to borrow the Circuit Court's alliteration, to try to rule out all possibility that te jury relied on the improper instruction in reaching its verdict: it must not be forgotten, after all, that it was the mere potentiality of prejudice attendant upon resort to a "natural and probable consequences" charge with which the Sandstrom Court was concerned.

Consistent with so broad a formulation, the State's petition for a writ of certiorari abandons the notion, advanced in all the courts below, that the supplemental charge language in respondent's trial was harmless error. While the State thus implicitly concedes the prejudice caused by that language, however, its petition seizes on the lack of contemporaneous objection at the trial to argue that the lower federal courts were wrong in granting habeas corpus relief. But, as the Circuit Court's

opinion observed,

> [i]n light of the state court's rejection of the State's procedural argument and its decision on the merits of Arroyo's due process claim, Arroyo's failure to object at trial does not bar federal review. Engle v. Isaac, ___ U.S. ___, 102 S. Ct. 1558, 1575 n.44 71 L.Ed.2d 783 (1982); Washington v. Harris, 650 F.2d 447, 452 (2d Cir. 1981) [petitioner's 7a; Arroyo v. Jones, 685 F.2d, supra, at 38 n.3].

Indeed, the New York court's response to the post-judgment motion indicated that if the supplemental instruction were held to be federal constitutional error New York would have no reluctance to grant Mr. Arroyo a new and fair trial.

Despite the State's recognition that it is, then, too late in the day to contend that trial counsel's "no opposition" declaration constituted a procedural bar to federal review, the State nevertheless maintains that this phrase -- which it variously terms an "express consent" and an "express approv[al]" of the proposed language[8] -- should be fatal, on the merits, to the due process attack which both lower courts have favored. Support for this view is said to come from dictum in Henderson v. Kibbe (443 U.S. 145, 154 [1977]) to the effect that "[i]t is the rare case in which an improper

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[8] More accurately described as an unenthusiastic endorsement, counsel's response to the prosecutor's suggestion reflected that prevailing New York law both gave him no reason to interpose an objection to "a natural and probable consequences" charge nor, had he done so, any indication that it would have been availing. See petitioner's 6a n.2; Arroyo v. Jones, supra, 685 F.2d at 38 n.2.

In this regard, it is certainly not amiss to note of the instant intent charge that, in addition to its treatment at trial, where an assistant district attorney sponsored it, defense counsel declined to object to it, and the trial judge employed it, both parties on appeal conceded it to be a correct statement of New York law. See n.6 supra.

instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." However, Kibbe completely fails to support the State's position because, as the Chief Justice's concurring opinion pointed out (433 U.S. at 158 n.*), New York there determined -- in stark contrast to the present case -- to invoke its procedural rules to bar review of the defendant's claim. And, furthermore, assuming arguendo the applicability of the State's interpretation of the "rare case" exception, the present case assuredly comes within that exception.

That this is so is indicated by the concurrence in Ramirez v. Jones, 683 F.2d 712, 717-18 (2d Cir. 1982) cert. pending sub nom, Jones v. Ramirez, No. 82-584, a Sandstrom case cited by the State in support of its reading of the Kibbe dictum. While the Ramirez concurrer generally argued for the applicability of harmless error doctrine to cases, like respondent's, where the unobjected-to error in the state court is advanced as the basis for a claim to federal habeas corpus relief, he refused to find the error in that case to be harmless:

> [since] the faulty [Sandstrom] language bore directly on intent -- the central issue in the case -- [the] failure to object does not alter the conclusion that [the habeas applicant] is entitled to a new trial (id., at 718). 9/

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9 That some Sandstrom language may well be held harmless on the facts of a particular case -- as a matter entirely distinct from the issue of whether or not there was an objection at trial -- is to be expected. (In this connection, we take note of the Court's having granted certiorari in Connecticut v. Johnson, 50 U.S.L.Wk. 4368 (1982), a case where the unconstitutional impact of a single improper general instruction in the principal charge was held not cured despite the presence of other proper general instructions in combination with other specific proper instructions on the elements of the crimes allegedly affected by the improper instructions.) However, as the Ramirez concurrence reflects, it is no less equally to be expected that other Sandstrom language will not be held harmless.

In view of the fact that the same situation obtained at Arroyo's trial, it is evident that Ramirez v. Jones offers no comfort to the State in this proceeding.[10]

This Court once highlighted the prominence of a supplemental charge with these words: ". . . special care was indicated in replying to a written request for further light on a vital issue. . . . Particularly in a criminal trial, the judge's last word is apt to be the decisive word." Bollenbach v. United States, 326 U.S. 607, 612 (1946). These words take on an extraordinary significance in the context of respondent's trial. Put plainly, there is simply no way to minimize, much less totally preclude (as Sandstrom requires), the potential for prejudice that the constitutionally erroneous natural and probable consequences charge given below could create for an accused whose jury has been unable for hours, and despite repeated re-instruction, to resolve the critical element of intent.

The State bills its case for further review in this Court as resting on a "narrow but significant" issue of law. That description is, at best, half right. Yet, and we now assume the propriety of using the former adjective in connection with the State's argument, the unavoidable conclusion remains that the Court of Appeals for the Second Circuit decided correctly and fairly that respondent

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10 Turoso v. Cleveland Municipal Court, 674 F.2d 486 (6th Cir. 1982), the other case relied on by the State is equally unavailing for Turoso dealt with the omission of an instruction, and not, as here, with the inclusion of an instruction specifically found to be burden-shifting.

was entitled to habeas corpus relief.

CONCLUSION

FOR THE ABOVE REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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October 27, 1982

APPENDIX C

Decision of the Supreme Court, New York County, denying respondent's motion to set aside his conviction.

SUPREME COURT OF THE STATE OF NEW YORK
TRIAL TERM PART 30
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THE PEOPLE OF THE STATE OF NEW YORK,

-against-

Index No. 2447/72

PEDRO ARROYO,

Defendant.

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SCHWARTZ, J.:

This is a motion by defendant to vacate a judgment entered on April 12, 1973, after a jury verdict convicting defendant of attempted murder of a police officer (P.L. 110.00 and former P.L. Sections 125.25 and 125.30); attempted first degree assault (P.L. Sections 110, 120.10); two counts of second degree assault (P.L. Sec. 120.05) and possession of a weapon as a felony. The mandatory sentence imposed on the attempted murder conviction was a minimum of 15 years and a maximum of life with concurrent indeterminate terms on the other convictions.

On April 14, 1977, the Appellate Division modified by dismissing the lesser counts and unanimously affirmed the attempted murder conviction.

On May 12, 1977 leave to appeal to the Court of Appeals was denied.

This motion was argued at length. Leave was granted to defendant's counsel to submit a reply to the People's supplementary memorandum of law. Material was submitted in February and March of 1980.

This motion to vacate a judgment of 1973 is based on the sole ground of a subsequent decision of the United States Supreme Court on June 18, 1979 in Sandstrom v. Montana, ____U. S. ____, 61 L. E.D.2d 39, 99 S. Ct. 2450 (1979). The Supreme Court there held to be violative of Fourteenth Amendment due process the jury instruction, given over defendant's objection as follows: "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." (emphasis added) The Court in Sandstrom found the phrase objectionable on two grounds. One was that the jury may have interpreted the instruction as shifting the burden of proof to the defendant. The second ground was that the jury may have regarded the presumption as conclusive, relieving the State of its burden of proof.

In the case at bar, in its initial charge to the jury prior to commencement of its deliberations, the court omitted any mention of presumption language. Subsequently, the jury submitted a question and the court gave a supplemntary charge in language proposed by the prosecution, to which the defendant's attorney made no objection and responded "I have no opposition to it." The court thereupon, together with additional language defining intent, charged: "By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequences of their acts." Such charge has been conceded by defendant to have been a correct statement of New York law [1].

The question presented by defendant's motion is: did the language of such supplementary charge, violate the Fourteenth Amendment's requirement that the State prove every

element of a criminal offense beyond a reasonable doubt?

On June 18, 1979, six years after the conviction of the defendant Arroyo of attempted murder of a police officer, the Supreme Court decided Sandstrom v. Montana, supra. In that case at a jury trial in a Montana state court on a charge of deliberate homicide, the defendant admitted killing the victim but argued that he did not do so purposely or knowingly and was therefore not guilty of deliberate homicide but of a lesser crime. The trial judge, over the objection of defendant's counsel who argued that such instruction had the effect of shifting the burden of proof on the issue of purpose or knowledge to the defense, instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." In Sandstrom, the Supreme Court held that such jury instruction was unconstitutional as violating the Fourteenth Amendment due process requirement that the state prove every element of a criminal offense beyond a reasonable doubt, since the jury might have interpreted the presumption in the instruction as a conclusive presumption which would conflict with the overriding presumption of innocence. Sandstrom held that where intent is an element of the crime charged and where the jury is not told they have a choice, or that they might infer that conclusion, and if the instruction is considered to be a mandatory presumption rather than a permissive inference, and where the jury is not told that the presumption can be rebutted by the defendant's simple presentation of some evidence, nor even that it can be rebutted at all, the burden of persuasion on the

element of intent is effectively shifted.

In Sandstrom, the Supreme Court declined to reach the issues of whether a jury's reliance upon an unconstitutional instruction constituted harmless error and whether an unconstitutional jury instruction on an element of crime can never constitute harmless error where the state's highest court, which affirmed the conviction, had considered none of these issues. It held that the state court will be free to consider such issues on remand from the Supreme Court if it so desires.

The instant case in which defendant Pedro Arroyo was convicted of the attempted murder of a police officer and the Sandstrom case where Sandstrom was convicted of deliberate homicide in that he purposely or knowingly caused the death of Annie Jessen, are markedly different.

In Sandstrom defendant's counsel specifically objected to the charge on presumption which was given in the initial instructions by the court, on the ground that "the instruction has the effect of shifting the burden of proof on the issue of purpose or knowledge, to the defense." He was overruled. In Arroyo, the court made no mention of presumption in its initial charge. When a jury question was later submitted, the court consulted both counsel as to the language of the answer, the prosecution proposed what he described as "the standard charge" and defendant's counsel gave his approval by stating he had "no opposition to it." The court thereupon instructed the jury, together with a repetition of the definition of

intent, that "By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts."

In Montana, where Sandstrom originated, the law was different from that of New York. The Rules of Evidence of the State of Montana provided that disputable presumptions "may be overcome by a preponderance of the evidence contrary to the presumption. Unless the presumption is overcome, the trier of the fact must find the assumed fact in accordance with the presumption" [Montana Rules of Evidence 301 (b)2.]. The Montana Supreme Court has held that some burden of proof may be allocated to the defendant. In view of the law of Montana and the posture the Sandstrom case assumed there, it was inevitable that the Supreme Court would find an unconstitutional shifting of the burden of proof to the defendant.

The situation in New York is quite different. New York has no such rule of evidence. The Arroyo jury was consistently instructed throughout the court's charge that the People had the entire burden of proof and that it never shifted to the defendant. There the questioned language of the supplementary instruction, when read, as it must be in the context of the entire charge, could not have been interpreted by the jury as shifting to the defendant the burden of proof on the issue of intent.

The questioned charge was, as defendant concedes, correct under New York law. Defendant's counsel emphasizes in his moving papers (Memorandum, p.6) "_ _ _ _counsel should not be faulted for consenting to the requested instruction when it is clear that the 'natural and probable consequences' charge had had long standing

validity in this state. See People v. Agron, 10 N.Y.2d 130, at 139(1961). And, indeed, decisional law continued to approve similar language as recently as People v. Dellipizzi, 61 A.D. 961 (1st Dept. 1978). Consequently, prior to the June 1979 decision in Sandstrom, this charge had never provided the basis for a reversal in New York."

Defendant now argues that even though the trial ended in March 1973 and the New York Appellate Division affirmed in April 1977 the attempted murder conviction and the New York Court of Appeals in May 1977 denied leave to appeal, these events all occurred before the Supreme Court decided Sandstrom on June 18, 1979. Defendant contends that his counsel's failure to object to a practice deemed valid in the state of New York cannot deprive him of the right to attack that practice where an intervening Supreme Court decision calls that practice into question, citing People v. Patterson, (39 N.Y.2d 288 [1976], aff'd. 432 U.S. 197). In Patterson, after defendant's conviction of murder, affirmed by the Appellate Division, and during the pendency of the appeal to the Court of Appeals, the Supreme Court decided the case of Mullaney v. Wilbur (421 U.S. 684, 704). The Supreme Court, in passing on a Maine statute, held that "the Due Process Clause requires the prosecution to prove beyond a reasonable doubt the absence of the heat of passion on sudden provocation when the issue is properly presented in a homicide case." Patterson argued that this decision required the striking down of sections 125.20 and 125.25 of the Penal Law to the extent that they require a defendant charged with murder to bear the burden of proving the

affirmative defense that he acted under the influence of extreme emotional disturbance. On the question of defendant's failure to object to the court's charge, the Court of Appeals stated (p. 295) "Strict adherence to the requirement that complaint be made in time to permit a correction serves a legitimate State purpose (Henry v. Mississippi, 379 U.S. 443, 447). A defendant cannot be permitted to sit idly by while error is committed, thereby allow the error to pass into the record uncured, and yet claim error on appeal. Were the rule otherwise, the State's fundamental interest in enforcing its criminal law could be frustrated by delay and waste of time and resources invited by a defendant. While the review by this court is restricted, on the initial appeal to the Appellate Division, that court, with its broader powers of review, may consider claims of error, notwithstanding a failure to object (CPL 470.15; People v. Robinson, supra)".

"There is one very narrow exception to the requirement of a timely objection. A defendant in a criminal case cannot waive, or even consent to, error that would effect the organization of the court or the mode of proceedings proscribed by law. (Concemi v. People, 18 N.Y. 314, 319.) In Concemi, it was held that a defendant could not consent to being tried by a jury of less than 12 members. In People ex rel. Battista v. Christian (supra), the court ruled that an information charging a defendant with an 'infamous' crime was a nullity, despite defendant's consent, where the State Constitution provided that infamous crimes could be prosecuted only by Grand Jury indictment. Thus the rule has come down to us that where the court had no jurisdiction, or where the

right to trial by jury was disregarded, or where there was a fundamental, non-waivable defect in the mode of procedure, then an Appellate Court must reverse, even though the question was not formally raised below. (People v. Bradner, 107 N.Y.1, 4-5; see People v. Miles, 289 N.Y. 360, 363-364).

This traditionally limited exception has, on occasion, been given broader expression. In People v. McLucas (15 N.Y.2d 167), the defendant did not object to a comment by the trial court as to his failure to testify. Our court ruled that "no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right."

The Court of Appeals in Patterson noted that prior to the Supreme Court's decision, there was no doubt that the extreme emotional disturbance affirmative defense was constitutionally valid. It stated (p. 296) "The defendant's failure to object to a practice deemed valid in this State cannot deprive him of the right to attack that practice when an intervening Supreme Court decision calls that practice into question . (See O'Connor v. Ohio, 385 U.S. 92,93; People v. Baker, 23 N.Y.2d 307,317). It is also significant that Mullaney was not handed down until well after the Appellate Division affirmed Patterson's conviction. Were we not to treat appellant's claim on the merits, Patterson would be deprived of a State forum in which his arguments could be heard. (Cf. People v. Robinson, 36 N.Y.2d 224,228 supra)."

As to the second procedural issue to-wit: retroactivity, the Court of Appeals held that the defendant might assert a

Mullaney claim even though his conviction predated that decision. It noted that Mullaney was based on the Supreme Court's earlier holding in In re Winship, (397 U.S. 358), a decision subsequently given retroactive effect. (Ivan v. City of New York, 407 U.S. 203).

Having determined the two procedural issues, New York's highest court turned to the merits. On the merits, it held that the New York law differed significantly from the Maine law struck down by the Supreme Court and stated (p. 297) "We believe that the law of this State does not infringe the due process interests that Mullaney sought to protect."

It should be noted that, despite defendant's failure to object to the 2-line portion of the court's supplemental charge, defendant urged the point in his appeal from his conviction. The Appellate Division affirmed his conviction of attempted murder of a police officer and the Court of Appeals denied leave to appeal.

We have here two procedural threshold issues. The first is whether the defendant, when he not only failed to object to the supplemental language but affirmatively declared that he had no opposition to it, waived his right to a review or preserved a question of law for review. The court in delivering the instruction, stated that it was "by agreement."

The second procedural question is whether Sandstrom should be applied retroactively. In the case at bar the jury was charged by the court in March of 1973. The Sandstrom case was decided by the Supreme Court on June 18, 1979, more than six years later and approximately two years after the New York Appellate Division had affirmed the attempted murder conviction and leave to appeal was denied by the Court of Appeals.

As to the first issue, that of waiver, it has been held that no exception is necessary to preserve for appellate review a deprivation of a fundamental constitutional right. (CPL 470.15; People v. Patterson, supra; People v. Robinson, 36 N.Y. 2d 224; People v. Branch, 54 A.D.2d 90; People v. Lucas, 15 N.Y. 2d 167, 172). While in the instant case, the defendant moves under CPL Section 440.10(h) to vacate his 1973 conviction on the ground of deprivation of a fundamental constitutional right, although enunciated by the Supreme Court six years after his conviction, he may not be barred from the making of such a motion because he failed to make objection and affirmatively declared he had no opposition to the questioned instruction.

Secondly, as to whether the defendant may assert a Sandstrom claim even though his conviction predates that decision, this court holds that he may. Sandstrom cites and is based in part on an earlier holding of the Supreme Court in Matter of Winship, (397 U.S. 358, 363-64) which decision was given retroactive effect. (Ivan v. City of New York, 407 U.S. 203). Accordingly, Sandstrom, like its progenitor Winship should be given retroactive effect. (People v. Gray, 71 A.D.2d 295[Fourth Department, Dec. 14, 1979]; People v. Patterson, supra; Mullaney v. Wilbur, 421 U.S. 684, 688).

In People v. Reyes, ___A.D.2d___(2nd Dept. Sept. 28, 1979), it was held that a similar charge was harmless error.

Now, as to the merits. What are the merits of defendant's claim that the trial court's instruction in the supplemental charge "[p]eople are presumed to intend the natural, probable and logical consequences of their acts" violated his constitutional right to due process of law? Defendant argues that based upon the reasoning of Sandstrom, the jury may have interpreted the instruction as establishing a conclusive presumption or as shifting the burden of persuasion to the defendant. If the prosecution's burden of proof was thereby diminished,

prejudice would exist. However, the totality of the prior charge in the instant case, which at great length, without any mention of presumption, instructed the jury in detail on the subject of intent, must be considered. "[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." (Cupp v. Naughton, 414 U.S. 141, 146-67[1973]). In Cagne v. Meachum (602 F.2d 471, 473[1st Cir. 1979]) where the petitioner sought habeas relief from his state conviction for murder, the jury was instructed, in terms far stronger than in Arroyo: "When the fact of malice is shown there is nothing to rebut the natural presumption of malice for the rational probability is that a man of sound mind intends the probable and natural consequences of his acts." There the 1st Circuit in denying the petitioner's prayer for relief, stressed that the complained of language had to be read in context and that the single remark complained of was not set out as a presumption for the defendant to rebut.

In People v. Albino, (__A.D.2d__ [2nd Dept. March 1980] New York Law Journal, p. 11 c. 2, March 6, 1980) the Appellate Division stated "Defendant's claim that the court's charge to the jury that 'it is a general rule that a person's actions reveal an expression of his mind. A person is presumed to intend the natural consequences of his acts,' violates the rule set forth in Sandstrom v. Montana (__U.S.__ [99 S. Ct. 2450]), is without merit, because a reading of the entire charge discloses that the matter of intent was left for the jury to decide based upon all of the evidence."

In People v. Fournier, 70 A.D.2d 491 [2nd Dept. Nov. 13, 1979] the court held that taking cognizance of Sandstrom, the instruction as to presumption there even though supplemental by a direction that the burden is upon the defendant to come forward, was nevertheless harmless error when read with the charge as a whole.

In People v. Blum, 72 A.D.2d 691 (1st Dept. Nov. 1979) the court, citing Sandstrom on language as to presumption given without objection, stated that there was no likelihood that the jury was misled and saw no error. It stated "In the light of Sandstrom v. Montana (__U.S.__, 616 E.D.2d 39), we deem it advisable to caution the Trial Justices not to use the language of presumption (as distinct from permissible but not necessary inferences) in connection with charges of intent in criminal cases."

The charge of this trial court in Arroyo, on the matter of intent stated in its initial instructions:

p.760 to p. 762 "What is intent; under our law, a person acts intentionally with respect to attempting to cause the death of another person when the alleged perpetrator's conscious objective is to cause such death. This portion of my charge is concerned itself only with the attempt to commit the crime of murder based on the intention to cause of death of a victim, of course, we all recognize that an intention is a subjective matter and it depends on the operation of an individual's mind-none the less it is possible to make a finding of intention based on objective actions of the alleged perpetrator; in fact, this is the only method that we can use in determining intention since we cannot get into the mind of the alleged perpetrator. Therefore, in your deliberation, you may use the defendant's objective action as a determining factor in deciding whether or not he acted intentionally.

You may also refer to all the other evidence which may indicate intent or not indicate intent. The Penal Law of the State of New York defines intentionally as follows: a person acts intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct. The Penal Law defines attempt as follows: a person is guilty of an attempt to commit a crime when with intent to commit a crime he engages in conduct which tends to affect the commission of such crime. You must remember that a defendant is charged with the attempt to commit the crime of murder against this police officer Raymond Bernard; therefore, the fact that he did not succeed in bringing about the death of Raymond Bernard is irrelevant, it is sufficient to constitute the crime of attempted murder if the crime could have been committed had the circumstances been as the defendant believed them to be;

> therefore, if you find that at the time and place alleged in the indictment, one, the defendant, Pedro Arroyo had a conscious objective to cause the death of Raymond Bernard and two, that pursuant to that conscious objective, he fired a loaded gun with live ammunition in it at Patrolman Raymond Bernard and three, that Patrolman Raymond Bernard although wounded from defendant's gun was injured but did not die and recovered from that wound, you must return a verdict of guilty of a of attempted murder under the first count of the indictment. However, in order to do so, all the elements must be proved to your satisfaction beyond a reasonable doubt. If any of the elements are not proved to your satisfaction beyond a reasonable doubt, you must return a verdict of not guilty of attempted murder under the first count of the indictment."

The jury subsequently requested that the court "explain to them again the law and the interpretation on the first charge." In response, the court repeated the above charge to the jury.

Thereafter, the jury, in a note, reported: "We have reached agreement on four charges and are divided on the fifth. To assist us with the latter, we would seek further clarification on the words conscious intent."

Out of the presence of the jury, the following colloquy took place.

"MR. BROOMER [ADA]: If Your Honor would take a suggestion from me as to the standard charge — just one line, namely, people are presumed to intend the natural, probable and logical concept (sic) once the act arises.

"THE COURT: Have you any objection to that Mr. Reid?

"MR. REID[Defense Counsel]:I have no opposition to it.

"THE COURT:People are presumed to intend the natural—

"MR. BROOMER: Natural and probable and logical consequences of their acts and you could put that together with the material you already have on intent, Your Honor...."

After the jury returned to the courtroom, the court charged the jury: "Now, members of the jury, a person acts intentionally with respect to attempting to cause the death or injury to another person, when the alleged

perpetrator's conscious objective is to cause such death or injury.

"Intention is a subjective thing and depends on the operation of the individual's mind. Nonetheless, it is possible to make a finding of intention based on the objective actions of the individual.

"The Penal Law defines intentionally with respect to a result or conduct described by a statute defining an offense when his conscious objective is to cause such result or to engage in such conduct.

"By agreement, I can tell you that people are presumed to intend the natural, probable and logical consequence of their acts."

It is this single sentence, agreed upon by both trial counsel, to which defendant's instant application is addressed.

This court finds, in the totality of the entire charge and the detailed instructions to the jury in this case that they did not have the same potential for impermissible burden shifting as the instruction struck down by the Supreme Court in Sandstrom. They did not deprive the defendant Arroyo of his right to due process of law under the Fourteenth Amendment of the United States Constitution, or violate the requirement that the State prove every element of a criminal offense beyond a reasonable doubt.

Settle order.

Dated:May 19. 1980

S/ HILDA SC

J.S.C.

1. People v. Stokes, 53 N.Y.2d 164, 179[1973]; People v. Aaron, 10 N.Y.2d 130 [1961]; People v. Thomas, 67 N.Y. 218, 225 [1876]; Richardson, Evidence, Sec. 90, at 64 [10th ed. 1973].

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